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No. 616

United States Court of Appeals

FOR THE SECOND CIRCUIT

October Term, 1954.

Docket No. 23191

UNITED STATES OF AMERICA, *ex rel.* JOSEPH ACCARDI,

Relator-Appellant,

—v.—

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service, New York District, Department of Justice,

Respondent-Appellee.

JOINT APPENDIX

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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United States Court of Appeals

FOR THE SECOND CIRCUIT

October Term 1954

Docket No. 2319[1]

UNITED STATES OF AMERICA, *ex rel.* JOSEPH ACCARDI,

Relator-Appellant,

—v.—

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service, New York District, Department of Justice,

Respondent-Appellee.

Statement Under Rule 15(b)

In accordance with the mandate of the United States Supreme Court, following prior litigation, in 347 U. S. 260, a writ of habeas corpus issued herein on May 10, 1954, on a petition verified May 15, 1953. A return to the writ, a traverse to the return, together with interrogatories addressed to respondent and the responses thereto, were thereafter filed. A hearing was held before the District Court, per Hon. John F. X. McGohey, District Judge, on June 23, 1954. The writ was thereafter dismissed by decision and order dated July 15, 1954, and a notice of appeal was filed on July 27, 1954.

Petition for Writ of Habeas Corpus

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 85-78

[SAME TITLE]

The petition of JOAN ACCARDI respectfully shows:

1. I am the wife of Joseph Accardi, the relator herein, who is presently being imprisoned and detained within the Southern District of New York by Edward J. Shaughnessy, District Director of the Immigration and Naturalization Service of the New York District.

2. My husband, Joseph Accardi, is a native and citizen of Italy, 42 years of age.

3. My husband, Joseph Accardi, last entered the United States during August, 1932 and has remained here ever since.

4. On April 3, 1953, the Board of Immigration Appeals affirmed an order of deportation against my husband upon the ground that he entered the United States in 1932 without an immigration visa.

5. The Board of Immigration Appeals refused to exercise favorable discretion to permit my husband to remain here in the United States as a permanent resident.

6. My husband has been living in the United States for a period of twenty one years. He is lawfully married to me; and I am a lawful resident of the United States. We have an American born child who was born to us in 1951.

7. My husband has been a person of good moral character for the past ten years and during this period has not been in conflict with the law.

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8. In all similar cases the Board of Immigration Appeals has exercised favorable discretion and its refusal to do so herein constitutes an abuse of discretion.

9. That on April 6, 1945, favorable discretionary relief was exercised herein in the form of voluntary departure and preexamination, but my husband was unable to take advantage of this because the American Consul refused to issue a visa to him on the ground that he had been convicted of a crime in 1934.

10. That the aforesaid criminal ground may be waived by the Board of Immigration Appeals and in all similar cases has been waived by the Board of Immigration Appeals.

11. Upon information and belief that the Department of Justice maintains a confidential file with respect to my husband.

12. Upon information and belief that on or about October 2, 1952, the Attorney General announced at a press conference that he planned to deport certain so-called "unsavory characters."

13. That upon information and belief, on or about October 2, 1952, the Attorney General prepared a list of one hundred individuals whose deportation he sought in accordance with the announcement made at his press conference of October 2, 1952.

14. Upon information and belief, that included in this list of one hundred persons was the name of my husband, Joseph Accardi.

15. Upon information and belief, that the aforesaid list of one hundred individuals, including the name of my husband, was circulated by the Department of Justice among all its employees connected with the Immigration Service and the Board of Immigration Appeals.

16. Upon information and belief, that because of the listing of my husband's name on this confidential list and because of consideration of matters outside the record of his immigration hearing, discretionary relief has been denied to permit my husband to adjust his immigration status to that of a permanent resident.

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17. That application was made during the month of May, 1953 for reconsideration of my husband's case and such reconsideration has resulted in a reaffirmance of the order of deportation herein.

18. Upon information and belief that the Attorney General has issued several press releases with regard to my husband's case during the month of April, 1953 and because of the unfavorable publicity accorded to this case at the

instigation of the Attorney General, it has not been possible to secure a fair reconsideration and rehearing of this matter.

19. That the decision to deny discretionary relief herein was pre-judged by the Attorney General on October 2, 1952 when he included my husband's name in the list of one hundred so-called "unsavory characters" and since that time it has been impossible for my husband to secure fair consideration of his case.

20. That the present Attorney General has continued the policies and practices of his predecessor with reference to my husband's case.

21. That the deportation order entered herein and the order denying favorable discretionary relief is null and void, violates due process, and should be set aside.

22. That no previous application for the relief prayed for herein has been made to any court or judge thereof except that a previous writ was issued on April 22nd, 1953 and was denied after hearing by Judge Noonan.

23. That the previous writ did not set forth any of the facts herein concerning the prejudgment of the case, the use of confidential material in violation of law and the unfavorable publicity and lack of due process as alleged herein.

24. That in view of these entirely new allegations which are set forth herein it is believed that the instant writ should issue.

WHEREFORE it is respectfully prayed that the within writ of habeas corpus be allowed.

Dated, New York, May 15, 1953.

JOAN ACCARDI

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK,
SOUTHERN DISTRICT OF NEW YORK, *ss.*:

JOAN ACCARDI, being duly sworn, deposes and says that she is the wife of the relator herein, that she has read the foregoing petition and knows the contents thereof, that the same is true to her own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters she believes them to be true.

JOAN ACCARDI

(Sworn to May 15, 1953.)

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Affidavit of Custody

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civ. 85-78

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK,
SOUTHERN DISTRICT OF NEW YORK, ss.:

LESTER FRIEDMAN, being duly sworn, deposes and says, that he is an attorney in the office of the District Counsel, Immigration and Naturalization Service, United States Department of Justice, and makes this affidavit for submission to this court in connection with the issuance of a writ of habeas corpus herein and with respect to the relator's compliance with the order of this court dated May 3, 1954.

On May 10, 1954 the relator herein, in compliance with the order of this court, surrendered to the custody of the respondent at Ellis Island, New York Harbor, and will be continued in detention pending further proceedings herein subject only to administrative arrangements for the relator's temporary release on bond as stipulated and agreed by and between the attorneys for the respective parties hereto.

LESTER FRIEDMAN

(Sworn to May 10, 1954.)

Writ of Habeas Corpus

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

The President of the United States of America

To:

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization for the District of New York and/or whomsoever may have the custody of the body of

JOSEPH ACCARDI

GREETING:

YOU ARE HEREBY COMMANDED that you have the body of Joseph Accardi, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name Joseph Accardi is called or charged, before one of the Judges of the United States District Court, within and for the Southern District of New York, on the 11th day of May, 1954, at 10:00 o'clock in the forenoon of that day, in the United States Court House, Room 506, in the Borough of Manhattan, City of New York, to do and receive all and singular those things which shall then and there be considered concerning the said Joseph Accardi, and have you then and there this Writ.

Writ of Habeas Corpus

WITNESS, the HONORABLE JOHN C. KNOX, Chief Judge of the United States District Court for the Southern District of New York this 10th day of May, 1954.

WILLIAM V. CONNELL.

Clerk of the United States District Court
for the Southern District of New York

The foregoing Writ is hereby
allowed this 10th day of
May, 1954

THOS. F. MURPHY
U. S. D. J.

Return to Writ of Habeas Corpus

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 85-78

[SAME TITLE]

I, LESTER FRIEDMAN, attorney in the office of the District Counsel, Immigration and Naturalization Service, United States Department of Justice, hereby certify and make return to the writ of habeas corpus herein, based on the records of the Immigration and Naturalization Service which are incorporated herein by reference, as follows:

1. The relator, Joseph Accardi (Giuseppe Accardo), is an alien, a native and citizen of Italy, who last entered the United States surreptitiously on or about August 13, 1932 at Niagara Falls, New York, without inspection by immigration officials and without an immigration visa or other document required for admission to the United States. The relator then intended to remain permanently in the United States and continued to reside therein.

2. Deportation proceedings against the relator were instituted on October 31, 1947 by the due issuance of an immigration warrant for the relator's arrest, charging that he is subject to be taken into custody and deported on the ground that, at the time of entry, he was an immigrant not in possession of a valid immigration visa as required by law. Initial deportation hearings were discon-

tinued after the decision of the United States Supreme Court in the case of *Sung* v. *McGrath*, 339 U. S. 33, on February 20, 1950, inasmuch as that decision held that deportation proceedings were governed by the provisions of the Administrative Procedure Act under then existing law.

3. The relator was accorded a due and appropriate hearing, *de novo*, before a duly authorized and duly appointed hearing officer commencing on August 28, 1951, to show cause, if any there be, why he should not be deported. At the conclusion of the said hearing, it was the recommended decision of the hearing officer that relator be deported from the United States.

4. The relator, through counsel, urged that the aforesaid hearing be reopened in connection with his argument before the Commissioner of Immigration and Naturalization upon review of the hearing officer's decision. On January 28, 1952, the Commissioner of Immigration and Naturalization ordered the hearing reopened, so that additional evidence could be adduced on behalf of the relator as requested by his attorney.

5. On April 16, 1952, a further reopened hearing was commenced in accordance with existing laws and regulations. At the conclusion of the reopened hearing, on May 15, 1952, it was the decision of the hearing officer that the relator be deported from the United States on the charge stated in the warrant of arrest. It was the further decision of the hearing officer that the relator's application for discretionary relief from deportation be denied. The entire

record thereof was thereafter referred to the Commissioner of Immigration and Naturalization for review. On July 7, 1953, the Assistant Commissioner of Immigration and Naturalization adopted the findings, conclusions and order of the hearing officer and ordered the relator deported

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from the United States pursuant to law. The Assistant Commissioner of Immigration and Naturalization also denied the relator's applications for discretionary relief from deportation and certified the case to the Board of Immigration Appeals for final decision.

6. On April 3, 1953, the Board of Immigration Appeals ordered that relator's applications for discretionary relief from deportation be denied, and further ordered that the decision of the hearing officer be affirmed. A copy of the aforesaid decision was forwarded to the relator's attorney for his information.

7. On April 3, 1953, a warrant for the relator's deportation was duly issued and arrangements were immediately commenced to execute the outstanding order and warrant of deportation. Such arrangements were completed and the relator was scheduled for actual deportation on April 24, 1953. The relator was thereupon taken into custody pending immediate execution of the outstanding order and warrant of deportation. The deportation arrangements were interrupted by the allowance of a prior writ of habeas corpus on April 23, 1953, on the eve of the relator's scheduled departure (Civ. 84-269). The aforesaid writ of habeas corpus sought to challenge, primarily, the administrative denial of the relator's applications for discretionary relief

from deportation. The said writ came on to be heard before the Honorable Gregory F. Noonan, United States District Judge, who dismissed the writ by opinion dated April 30, 1953. An order thereon was thereafter duly made on May 5, 1953; the relator did not appeal.

8. After the relator's unsuccessful challenge of the administrative order of deportation, he filed a second petition for the allowance of a writ of habeas corpus and

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said petition was denied and a writ refused. The disallowance of the writ was affirmed by the United States Court of Appeals for the Second Circuit and thereafter reversed by the Supreme Court of the United States, which directed that a writ issue and the relator be afforded an opportunity to submit proof of his allegations that the decision of the Board of Immigration Appeals was prejudged. An order on the mandate of the United States Supreme Court dated May 3, 1954, has now been duly entered herein and a writ of habeas corpus has issued.

9. The petition for the writ of habeas corpus herein alleges three principal grounds upon which he seeks to attack the validity of the outstanding order for his deportation. First, petitioner alleges that the order for his deportation was based, at least in part, upon the consideration of confidential information or other material outside the deportation hearing record. As to this allegation, it is emphatically denied that the hearing officer, the Assistant Commissioner of Immigration and Naturalization or the Board of Immigration Appeals considered any matter which was not incorporated into the hearing record in

arriving at their respective decisions. In particular, the decision of the Board of Immigration Appeals has carefully and fully discussed only the evidence in the record which was amply sufficient to support the discretionary denial of suspension of deportation. The relator entered the United States by flagrantly violating the immigration laws thereof, and for many years thereafter was involved in criminal activities which resulted in numerous arrests and finally in his conviction upon several counts for conspiracy to defraud the United States. Moreover, the propriety of the denial of discretionary relief based upon the relator's unsavory background and criminal activities has already been adjudicated by this Court in the prior writ

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of habeas corpus.

10. The relator now also contends that he has in some manner been denied due process of law because other aliens similarly situated have been granted discretionary relief. As to this ground for judicial intervention, it is again emphatically denied that all other aliens, similarly situated, have been granted discretionary relief from deportation. It has always been the practice and policy of the Board of Immigration Appeals to consider the individual merits of each and every case in determining whether the case of a particular alien is sufficiently meritorious to warrant the granting of discretionary relief. Obviously, the unfavorable factors considered in the record of this case are unique to this case. The criminal record of the relator, coupled with his unsatisfactory explanation of his sources of income, led the Board to conclude that the relator has failed to establish that degree of merit which would warrant

favorable action. This Court can take judicial notice of the fact that it has not been the uniform practice of the Attorney General to grant discretionary relief to deportable aliens with criminal records; one of the leading cases wherein such facts were involved is *United States ex rel. Adel* v. *Shaughnessy*, 183 F. 2d 371. Since no two cases can be precisely similar, the determination of what weight to give a prior conviction necessarily depends upon the circumstances of the particular case.

11. As a third ground for judicial intervention, the petitioner alleges that the Board of Immigration Appeals prejudged his application for discretionary relief and that the Attorney General directed the Board's decision. It is on this allegation and the factual issue thus presented that the Supreme Court of the United States directed the allow-

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ance of the instant writ of habeas corpus so that relator would be afforded an opportunity of proving his charge. In this connection, it is emphatically denied that any of the administrative decisions made in the relator's case were prejudged or that any of the officers who participated in such decisions received advance instructions as to the manner in which they should decide the case. The decisions of the hearing officer, the Assistant Commissioner of Immigration and Naturalization, as well as the Board of Immigration Appeals, represent the independent judgment and discretion of the said officials, who exercised their judgment and discretion without influence, suggestion or direction by any superior officer.

12. While it is quite true that the Attorney General of the United States has launched a program to expedite

the enforcement of the immigration laws of the United States with respect to deportable aliens who are members of subversive, criminal, racketeer or other immoral classes, and while it is conceded that the relator herein has been included within that program, which was commenced in the fall of 1952 and still continues, such program did not and does not involve the preparation of any list of the aliens involved. Moreover, the Attorney General of United States has at no time circulated any list of such aliens either to officers or employees of the Immigration and Naturalization Service or to the Board of Immigration Appeals.

13. The fact that the relator's name was included in the program to expedite the enforcement of the deportation laws against aliens who are charged with being particularly undesirable as residents of the United States did not, directly or indirectly, influence the judgment or determination of the Board of Immigration Appeals to deny relator discretionary relief. The best possible evidence of this

fact lies in the recognition that the Board merely concurred in prior decisions of the hearing officer and the Assistant Commissioner of Immigration and Naturalization which were made long before the Attorney General's program was even commenced.

14. The program of the Attorney General was designed only with respect to enforcement measures which must be taken in connection with the administration of the immigration laws of the United States and was at no time concerned with the adjudication of any particular case. The

program was intended to prevent unnecessary delays on the administrative level in cases where the interests of the United States were deemed to be more gravely involved if a final adjudication were made adverse to the given aliens. That program, from its commencement, was always understood by the Board of Immigration Appeals and officials of the Immigration and Naturalization Service as neither directing nor suggesting the nature of the decision that would be ultimately made. Although no written instructions of any kind were issued at the inception of the program as to its scope and intent, no misunderstanding has ever arisen on the administrative level. However, because of the charges made in this very case, and to prevent frivolous and unsupportable charges of the same nature being made in other cases, the Attorney General of the United States has now, by written order of April 23, 1954, issued the following written instructions:

"(1) Wherever the regulations confer upon any officer or the Board of Immigration Appeals a power to hear and decide, this power is to be exercised fully and faithfully. It is expected that such officers and the Board will exercise their independent judgment and such independent discretion as the regulations confer upon them.

"(2) Ultimate authority to grant suspension of deportation or other discretionary relief is lodged with the Attorney General. Insofar as such authority has

been delegated, subject to revision by the Attorney General, to subordinate officers and the Board of Immigration Appeals, it is to be exercised by them on the

basis of their own understanding and conscience directed to the facts of each individual case, uninfluenced by extraneous statements by persons official or unofficial.

"(3) It has for some time been the policy of this Department, publicly announced, to proceed with vigor against aliens who are in the United States illegally and whose criminal or subversive activities make their prompt deportation desirable in the national interest. This program will continue. However, neither the selection nor the identification of cases believed to be within the scope of this program is any responsibility of those exercising adjudicatory functions in deportation proceedings. Effectuation of the program has been, and continues to be, the responsibility of those charged with prosecuting duties. Accordingly, it is not intended that there be any departure from the regulations in the hearing and decision of any individual case, whether or not it is thought to fall within the policy of deporting criminal or subversive aliens. Those charged with the duty of hearing and deciding must give each alien a fair and impartial trial, without prejudgment on the basis of assertions by any official having the function of prosecuting these cases."

The foregoing order merely places into written form what has always been understood to be the scope of the Attorney General's program.

15. As clearly indicated by the decision of the Board of Immigration Appeals, that Board did not consider any matters outside the deportation hearing record in denying

discretionary relief to the relator. Nor was the judgment of the Board influenced, one way or another, by the fact that the relator herein was included within the Attorney General's program. Nor was the Board of Immigration Appeals influenced by the small degree of publicity which may have been given to this case. Again it is apparent that most of the administrative decisions herein were made long before any publicity of any kind was connected with the case.

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16. Evidentiary support to the return to the writ of habeas corpus herein is being submitted to this Court by affidavit, pursuant to the provisions of 28 U. S. C. 2246.

WHEREFORE, it is respectfully prayed that the writ of habeas corpus herein be dismissed in all respects and the relator remanded to the custody of the respondent.

Dated: New York, N. Y., May 10, 1954.

LESTER FRIEDMAN

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Affidavit of Lester Friedman

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 85-78

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK,
SOUTHERN DISTRICT OF NEW YORK, *ss.*:

LESTER FRIEDMAN, being duly sworn, deposes and says:

That he is an attorney in the office of the District Counsel, Immigration and Naturalization Service, United States Department of Justice. This affidavit is made in support of the respondent's return to the writ of habeas corpus herein and for submission to this court, pursuant to the provisions of 28 U. S. C. 2246.

At the outset, it is hereby stated that deponent has carefully and fully examined the Immigration and Naturalization files and records pertaining to this relator. It has been ascertained that the deportation hearing record which has been incorporated by reference into the return to the writ of habeas corpus herein contains the papers and documents which were furnished to and available to the Board of Immigration Appeals at the time that Board heard oral argument and made its decision denying the relator's applications for discretionary relief. Moreover, no documents

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of any kind were submitted to the Board of Immigration

Appeals which are not attached to the administrative record. More particularly, no "list" of any kind including this relator's name or any other alien's name was furnished to or made available to the Board of Immigration Appeals for its use in considering the merits of this case. To summarize, the Board had before it only the administrative deportation record which has been incorporated intact into the return to the writ of habeas corpus herein.

The petitioner's reference to a "list" of persons which was allegedly prepared by the Attorney General is a complete distortion of the deportation program and policies of the Government. The following explanation is accordingly intended to clarify the matter.

Since the Attorney General of the United States is charged by statute with the administration and enforcement of the immigration laws thereof and since the Immigration and Naturalization Service is an agency within the Department of Justice which acts for the Attorney General in performing the numerous functions and responsibilities relating to immigration and nationality matters, he is the highest executive officer who must accept the ultimate responsibility for policy rulings and the efficient enforcement of much of the immigration and nationality laws of the United States. In recent years, the combination of increased case loads, as well as personnel shortages within the Immigration and Naturalization Service, have resulted in the accumulation of arrearages in much of the operation of the Service. It was inevitable that such arrearages would also develop in the more complex or involved cases such as those dealing with the

deportation and denaturalization of subversives and those

aliens or citizens who are members of the criminal, racketeer or immoral classes. Of course, normal delays in routine cases could not prejudice the government's interests; however, such delays in flagrant cases or cases involving undesirable residents of the United States by reason of subversive, criminal or other unsavory backgrounds, would defeat the prime congressional purposes in directing the deportation of undesirable aliens or the denaturalization of persons who procured citizenship by illegal or fraudulent means. In the Internal Security Act of 1950, Congress took particular notice of the necessity for more vigorous enforcement of the immigration laws with respect to aliens of the "subversive, criminal or immoral classes," by making specific reference to such persons in §2(13) of that Act.

In line with a proper and necessary policy of concentrating the efforts of government officials in the types of cases wherein the interests of the United States are likely to be found to be more gravely involved, the Attorney General of the United States in the fall of 1952 commenced a program designed to give expeditious attention to the more serious cases on a priority basis. This program was commenced by a request to the various field offices of the Immigration and Naturalization Service to furnish to the Department of Justice reports of all pending cases of the types mentioned with details as to the status of each case and the action that was being taken. From these reports the Attorney General was in a position to adequately survey the scope and extent of the operations of the Immigration

and Naturalization Service, the need for personnel and to solve various administrative problems as they arose as a

matter of executive policy. From this group of reports, statistical data was compiled and press releases were issued from time to time. No list as such was ever compiled of these cases although the Attorney General's program has been loosely referred to as one in which a "list" of certain aliens was involved. The term "list" seems to have arisen through the coincidental choice of that term in making reference to the Attorney General's program notwithstanding the fact that cases are continually being added and removed from the program and no formal "list" has ever been prepared and certainly no "list" has ever been distributed by the Attorney General to the Board of Immigration Appeals, the Immigration and Naturalization Service or any other government official. The group of cases embraced within the Attorney General's program is nothing but a statistical collection of cases designed to keep the Attorney General informed of matters which are not of a routine nature so that the Attorney General may better carry out his responsibilities under the law and strive for maximum efficiency in the operations of the various branches of the department under his supervision. As a matter of fact, extensive statistical records are kept for all cases pending before the Immigration and Naturalization Service, including the routine matters, so that any and every alien could contend that his name was included in some kind of a "list."

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Since no formal "list" has ever been prepared of cases within the Attorney General's program, it is obvious that no such "list" could have been distributed or circulated to the Board of Immigration Appeals or the Immigration and Naturalization Service. Moreover, it is here emphat-

ically stated that no oral or other communication of the names of aliens included in such program were distributed or circulated to the Board of Immigration Appeals. While it is conceded that the relator herein is one of the cases which has been included in the Attorney General's program, the Board of Immigration Appeals has not, directly or indirectly, been advised, or instructed to decide the case adversely to the relator by reason thereof.

The program of the Attorney General with reference to deportable aliens who are deemed to be particularly undesirable or whose cases are deemed not of a routine nature, is a program intended to prevent unnecessary delay, occasioned or tolerated through negligence or indifference of officials charged with the responsibility of carrying out the enforcement measures provided for by statute. It is not and never was intended to pre-judge any particular case and was never accompanied by any directive as to how a particular case should be decided. The nature of the Government's program can best be evidenced by the careful and even favorable action which has been taken in various cases in which the aliens' names were included under the Attorney General's program designed to insure the efficient enforcement of deportation laws against aliens charged with being especially undesirable. In at least two "program" cases, hearing officers have ruled that the persons involved were not subject to deportation (Matter of M—, Imm. File No. E-076973, January 7, 1954; Matter of R—, Imm. File No. A-4656075: January 14, 1954). In at

least two other cases the Board of Immigration Appeals has affirmed orders granting discretionary relief to the aliens (Matter of M—, Imm. File No. A-2182808, January

25, 1954; Matter of F—, Imm. File No. A-7388927, August 19, 1953). In at least four other cases the Board of Immigration Appeals has ordered the proceedings reopened to consider further applications for suspension of deportation or to permit the filing of such applications. (Matter of B—, Imm. File No. E-082511, October 10, 1953; Matter of B—, Imm. File No. A-2544646, December 28, 1953; Matter of C—, Imm. File No. E-051721, January 21, 1954; Matter of M—, Imm. File No. A-3486560, October 9, 1953.)

The program and policies of the Department can be summarized by repeating herein the concluding statements made by Deputy Attorney General Rogers on September 29, 1953 to the District Directors of the Immigration and Naturalization Service:

"We are all aware of the tremendous amount of manpower and time required to process denaturalization and deportation cases to a conclusion. Aside from investigation, review and administrative adjudications and appeals, there are judicial reviews, stays, and appeals which must be met and served before final action may be taken in any case. We are not begrudging these time and manpower consuming steps—on the contrary we would be the first to defend the naturalized citizens' and aliens' right to them—but we should make certain that we handle them with as much dispatch and vigor as is consistent with good government and the rights of the parties involved. There should be no delay occasioned or tolerated through negligence, indifference, or purely dilatory tactics. The alien or naturalized citizen, as well as the public as represented through its Government, is entitled to a speedy but thorough adjudication of these cases. More-

over, whenever the opportunity arises, care should

be taken to explain to members of the public these various steps which must be taken in the denaturalization and deportation processes so that they may understand why such action cannot and should not be accomplished in a summary manner, a manner in which we know that the American people would not countenance even if it were legally possible."

It has never been unusual for the Immigration and Naturalization Service or the Board of Immigration Appeals to give priority or preference to certain classes of cases. For example, it has long been the policy to expedite the cases of aliens who are detained without bond. The present program merely adds to the classes of cases which should be handled without unnecessary delay, those of aliens who are charged with being least desirable as residents of the United States. Obviously, all aliens within the Attorney General's program have some unfavorable or unsavory factors in their backgrounds which would make it more difficult for them to establish the type of merit which would warrant the granting of discretionary relief. But this is true, not because of the Attorney General's program but because of their own past conduct. It is hardly a matter for judicial intervention when an executive officer of the United States exercises his judgment and determines the relative importance and priority of the numerous tasks and responsibilities which he must assume or direct.

It is also felt necessary to point out that the functions of the Department of Justice and the Immigration and

Affidavit of Lester Friedman

Naturalization Service, in cases such as the one at bar, can be divided into two major categories. The first pertains to the purely enforcement measures which must be taken, such as the preliminary investigation of the case, the arrest of the alien, and the actual physical deportation.

On the other hand, the determinations of issues of fact and law as well as the exercise of discretionary clemency are within the adjudications functions. This distinction is significant to point out, because the program of the Attorney General has dealt solely with the enforcement functions and has not been concerned with the nature of the adjudication of any case. Briefly, the program of the Attorney General was and is one designed to promote efficient operations and prevent unnecessary delays.

Finally, it should be pointed out that the Board of Immigration Appeals, though aware of the Attorney General's program and frequently requested to expedite consideration of cases embraced within the program, did not at any time permit a request for priority in this or any other case to influence its judgment. The Board of Immigration Appeals obviously exercised its independent judgment in this case and denied the relator's application for discretionary relief, after a full and fair consideration of the case. This can be best demonstrated by the closing language of the Board's decision:

> "After considering all of the facts and circumstances in the case, we believe that the application for relief should be denied as a matter of administrative discretion."

LESTER FRIEDMAN

(Sworn to May 10, 1954.)

Traverse

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 85-78

[SAME TITLE]

Joan Accardi, the petitioner herein does hereby make the following traverse to the return herein:

1. I assert that the return herein and affidavit attached thereto does not fully or fairly reflect the true facts with regard to my husband's case.

2. The Attorney General of the United States announced a program to deport racketeers in October of 1952. My husband's name was, as is admitted by the return, included within that program. The Board of Immigration Appeals was secretly advised of this fact before the case was decided by the Board on April 3, 1953. This fact was not known to my attorney at that time nor did the Board or the Immigration Service then advise us of this fact.

3. My husband is not and was not a racketeer nor was he ever charged at the immigration hearing with being a racketeer. Nevertheless, the Department of Justice announced on April 3, 1953, that the Board ordered the deportation of Joseph Accardi "known as a New Jersey racketeer".

4. In this very court, on two occasions as the Supreme Court record and its decision in my husband's case will

reveal, Assistant United State Attorney William Sexton admitted that my husband's name was on the Attorney

General's list of alien *deportees*, i.e., a list to deport, not to expedite! Within the Department of Justice and even outside of the Department, those within the Attorney General's Program are referred to as being on the list. My present attorney advises me that in the case of Dominic Amalone now pending in the Pittsburgh Immigration Office a Government Exhibit bears the notation "A. G.'s list". Whether there is or is not a mimeographed list is not the point. Records are in fact kept of those within the program and the names of those within the program are referred to as being on the list. I am advised and believe that a list is kept within the Department and was kept by Attorney General McGranery. I believe that such a list still exists. Whenever a case on the list or program is before the Board, it is advised of that fact.

5. I deny that the program was designed only to expedite cases. Why would a racketeer ever be entitled to a quick favorable decision. It was a program to deport. Attorney General McGranery so designated it. Attorney General Herbert Brownell has so referred to it in his public utterances. It was a deportation drive pure and simple. Not one case is cited in the traverse where the Board of Immigration Appeals cancelled a deportation order or granted suspension or preexamination to an alien within the program—and such were the only ways in which an alien could be granted permanent residence.

6. The Attorney General's program was one designed to gain publicity to his deportation drive and with each case on the list or within the program, press releases were is-

sued. These press releases always announced that some underworld character, racketeer, or communist was arrested for deportation or ordered deported. Not a single press release was ever issued stating that deportation proceed-

ings were cancelled or that they ended favorably to the alien. And, when unfavorable action was taken against those within the program it was quite normal for the Attorney General to state that it was:

> "Another step in his denaturalization and deportation program aimed at *ridding* the Nation of undesirable aliens engaged in racketeering and other criminal activities." (Press Release of December 8, 1952 with reference to Jack Dragna.)

7. However much the respondent would now like to make the program one to expedite cases—even to favorable decisions—there can be no mistake. The program was designed to rid the nation of racketeers and by prejudgment in the secrecy of his chambers, the Attorney General improperly designated my husband as a racketeer, which designation was improperly and secretly communicated to the Board of Immigration Appeals.

And the Board at no time prior to the filing of the writ herein—ever expedited a case within the program to grant permanent residence to an alien. To expedite program cases was to deport. As Justice Clark noted in the instant case 347 U. S. at 267:

> "To be sure, the petition does not allege that the 'Attorney General ordered the Board to deny discretionary relief to the listed aliens.' It would be naive to expect such a heavy-handed way of doing things."

Traverse

8. It is the height of naivete to assume that the public pronouncements of the Attorney General that he had a program to deport racketeers followed by a secret communication to the Board that my husband was a racketeer and within the program did not influence the judgment of

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the Board.

9. That such was the case is accentuated by the announcement on April 3, 1953, that my husband was a racketeer. Of what avail was his subsequent petition for reconsideration. And yet on the same day that it was publicly announced that my husband was a racketeer, the Board found him to be of good moral character.

10. The traverse now asserts that deportation was ordered and discretion denied because of my husband's criminal past including numerous arrests. Arrests without convictions have never been a ground for denial of relief. My husband moreover only had two arrests, one in 1933 and one in 1934—not numerous arrests. In 1940, he received a *suspended sentence* for violation of 18 U. S. C. 88. That he has been a person of good moral character for the past ten years (Petition Paragraph 7) still stands undenied and is corroborated by a favorable finding in the decision of the Board dated April 3, 1953. And with full knowledge of this record, the Board did grant favorable relief to my husband in 1945. What new factors—other than the Attorney General's program has intervened?

11. My husband has been ordered deported solely because he has been secretly and improperly designated as a racketeer. As a matter of fair play, he should be confronted

with the evidence and allowed to disprove the allegation rather than to be placed secretly within a purge program in the manner reminiscent of the era of Hitler, Mussolini and Stalin.

WHEREFORE, it is respectfully prayed that the writ of habeas corpus be allowed herein.

JOAN ACCARDI

DISTRICT OF COLUMBIA, *ss.*:

Joan Accardi, the petitioner, being duly sworn, deposes —30—

and says:

I have read the foregoing traverse and know the contents thereof and that the same are true of my own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters, I believe them to be true.

/s/ JOAN ACCARDI

Subscribed and sworn to before me
this 27th day of May, 1954.

/s/ ANNA A. HAMMOND
Notary Public D. C.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Traverse have been served upon J. Edward Lumbard, U. S. Attorney for the Southern District of New York, by placing same in the mail, postage prepaid, addressed to United States Court House, Foley Square, New York, this 27th day of May, 1954.

JACK WASSERMAN

Affidavit of Joan Accardi

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 85-78

[SAME TITLE]

DISTRICT OF COLUMBIA,
CITY OF WASHINGTON, *ss.*:

JOAN ACCARDI, being duly sworn deposes and says:

I am the petitioner herein and I make this affidavit pursuant to 28 U. S. C. 2246.

The following is a chronological summary of pertinent public announcements of the Department of Justice as reflected in their official press releases:

October 2, 1952: The Attorney General announces his special drive to deport alien racketeers.

April 3, 1953: Announcement of Board of Immigration Appeals order of deportation against Joseph Accardi "known as a New Jersey racketeer". This action was taken "under the current denaturalization and deportation program of Attorney General Brownell against top racketeers and subversives."

April 20, 1953: Announcement of apprehension of Joseph Accardi, "Newark, N. J. racketeer" for deportation on April 24, 1953.

May 11, 1953: Announcement of denial by Board of Immigration Appeals of motion by Joseph Accardi,

"Newark, New Jersey racketeer, for reopening of his deportation case."

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May 20, 1953: Release of speech of May 19, 1953 by Attorney General Brownell before the Stark County Division, Ohio Republican Finance Committee Dinner at Canton, Ohio. At page 8 of speech, the Attorney General stated:

> "But here are a few examples of the thousands of decisions and actions the Department of Justice may be called upon to make in a single day: • • • to initiate deportation proceedings against undesirables like Joseph Accardi • • • ".

October 30, 1953: Address of Assistant Attorney General in charge of the Criminal Division before the Chicago Crime Commission (pp. 10-11):

> "The second area is one in which the Department of Justice has not only primarily but exclusive jurisdiction—the field of denaturalizing and deporting gangsters and racketeers, who are foreign born and who because of their criminal activities, can make no claim to remain in the United States while violating its laws. • • • To name but a few of the nationally known hoodlums who are the object of the program • • • Joe Accardi • • • and Joe Adonis of New York, have • • • been ordered deported."

JOAN ACCARDI

(Sworn to May 27, 1954.)

Affidavit of Joan Accardi

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the within affidavit has been served upon J. Edward Lumbard, Esq., U. S. Attorney for the Southern District of New York, by placing same in the mail, postage prepaid, addressed to United States Court House, Foley Square, New York, this 27th day of May, 1954.

JACK WASSERMAN

Interrogatories Propounded by Relator

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 85-78

[SAME TITLE]

Pursuant to 28 U. S. C. 2246 and Rule 33 of the Rules of Civil Procedure the relator submits the following interrogatories to be answered on behalf of respondent:

1. Did Attorney General McGranery announce a program on October 2, 1952, to deport unsavory characters in order to destroy the roots of organized crime in America?

2. Was the aforesaid program aimed at deporting and ridding the Nation of undesirable aliens engaged in racketeering and other criminal activities?

3. In conjunction with the aforesaid program did Attorney General McGranery maintain a list of aliens within the program?

4. Did not Attorney General McGranery keep such list of names in a book maintained in his suite of offices?

5. Did Attorney General McGranery ever state publicly or in writing that his program was concerned solely with expediting cases within the program? If so, please set forth the dates and details of such statements.

Interrogatories Propounded by Relator

6. Was it not usual to refer in written and oral communications to cases within the program as being on the Attorney General's list?

7. Was it not usual to include cases within this program in advance of the final order of deportation?

8. Was the relator, Joseph Accardi within this program?

9. Did not assistant United States Attorney William Sexton state in open court before Judge Noonan and Judge Clancy that Joseph Accardi "was on the Attorney General's list of alien deportees?"

10. When was Joseph Accardi's name placed within the program?

11. When and in what manner was this communicated to the Board of Immigration Appeals? If in writing, set forth the text of such communication. If oral, state by whom such communication was delivered and the text or substance of such oral communication?

12. In what manner were names selected for the Attorney General's program, by whom were they selected and what was the criterion for placing their names within the program?

13. Was Joseph Accardi the object of the program to deport racketeers or unsavory characters?

14. Did the Commissioner of Immigration maintain a list of those within the program?

Interrogatories Propounded by Relator

15. State whether anyone else within the Department of Justice or the Immigration Service had copies of this list? State the names of such individuals and their official positions.

16. At the time of oral argument of Joseph Accardi's case before the Board, was Accardi or his counsel advised that he was within the Program by the Board or anyone else?

17. Was information that Joseph Accardi was within the Attorney General's Program communicated *ex parte* to the Board without notification to relator or his counsel?

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18. [Sic] cases within the Attorney General's Program? If so state their names and official positions?

19. Did anyone connected with the enforcement of the Attorney General's Program communicate directly or indirectly with the Board with reference to the Program? If so, set forth who such individuals were, the date and text of such communications.

20. Did anyone connected with the enforcement of the Attorney General's Program communicate directly or indirectly with the Board with reference to Joseph Accardi's case? If so set forth who such individuals were, the date and text of such communications.

21. Did Attorney General Brownell continue the program of Attorney General McGranery to rid the country of alien racketeers?

Interrogatories Propounded by Relator

22. Did Attorney General Brownell or anyone within the Department of Justice consider Joseph Accardi to be a racketeer and a nationally known hoodlum?

23. What was the basis for such description of Joseph Accardi? What conduct of Joseph Accardi subsequent to 1945 led to this description?

24. Was it not the policy of the Department of Justice or Immigration Service to concentrate upon the deportation of alien racketeers?

25. Did it not assign the most capable and experienced investigators to cases within the Attorney General's Program even at the expense of other work?

26. Was not top priority given to these cases looking to the entry of orders of deportation?

27. Is a confidential file maintained by the Immigration Service with respect to Joseph Accardi?

28. Was this confidential file ever transmitted to the Board of Immigration Appeals?

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29. Are any records maintained to show when confidential files are transmitted to the Board? If so in what way are such records kept and what do they show with reference to the Board's consideration of confidential material relating to Joseph Accardi?

30. How many cases are presently included within the Attorney General's Program?

Interrogatories Propounded by Relator

31. How many have reached final orders?

32. Of the cases finally completed how many have resulted in final orders requiring the alien to leave the country by:

(a) Voluntary Departure

(b) Deportation.

33. How many have resulted in final orders granting or authorizing permanent residence by:

(a) Suspension of deportation

(b) Preexamination.

34. Set forth the names if any, file numbers and dates of all cases within the Attorney General's Program where the Board either granted preexamination and/or suspension.

35. Is it not usual for the Department of Justice to issue press releases in cases within the program where deportation has been ordered?

36. Has the Department of Justice ever issued a press release in any case where an alien within the program has been permitted to remain here?

37. When for the first time was any written communication given to the Board stating that the program was solely concerned with expedition?

38. Is it not true that the Board has rarely, if ever, authorized the grant of permanent residence to an alien within the program?

Interrogatories Propounded by Relator

39. Did the Commissioner of Immigration ever tell anyone (a) that Joseph Accardi was on the Attorney General's

list and (b) that nothing could be done for him until his name was taken off the list?

40. Do all Departmental Press Releases come to the Board?

41. Are they circulated among its members?

42. Did the Board receive and read the Press Releases relating to Attorney General McGranery's Program?

43. Was it aware of the program?

44. Was it the Board's policy to conform to the wishes and attitude of the Attorney General?

45. Was the Board or any of its members aware that the Department of Justice considered Joseph Accardi to be a racketeer, unsavory character, or nationally known hoodlum?

46. When and in what form did the Board or its members first learn of this designation?

47. Was not the policy of expediting cases within the Attorney General's Program a policy to expedite the cases of those thought to be unsavory characters, racketeers, or particularly undesirable?

Interrogatories Propounded by Relator

48. When did members of the Board lose their permanent civil service status and when were they placed in Schedule A or C?

JACK WASSERMAN
Attorney for Relator
Warner Bldg.
Washington, D. C.

IRVING RADAR, Esq.
Of Counsel
320 Broadway, New York

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Interrogatories has been served upon J. Edward Lumbard, Esq., U. S. Attorney for the Southern District of New York, by placing same in the mail, postage prepaid, addressed to United States Court House, Foley Square, New York, this 27th day of May, 1954.

JACK WASSERMAN

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Response to Interrogatories

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 85-78

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK,
SOUTHERN DISTRICT OF NEW YORK, *ss.*:

LESTER FRIEDMAN, being duly sworn, deposes and says that he is the same person who on May 10, 1954, verified the affidavit which has been submitted in this proceeding in support of the respondent's return to the writ of habeas corpus herein. The following answers are being made in response to the interrogatories propounded by the relator and received by the respondent with relator's traverse to the return. Although it is not conceded that Rule 33, of the Federal Rules of Civil Procedure, applies to habeas corpus proceedings, the interrogatories herein are being answered in accordance with 28 U. S. C. §2246.

1. On or about October 2, 1952, Attorney General McGranery did announce a program with respect to deportation proceedings with respect to undesirable aliens, although it is not known precisely what language was used therein and how the program was described.

Response to Interrogatories

2. The program of the Attorney General was aimed at expediting deportation proceedings so that deportable aliens of the criminal, racketeer or related classes who are found

to be undesirable could be removed from the United States without unnecessary delay.

3. No formal list was maintained by Attorney General McGranery concerning the aliens included within the program as far as is known to the undersigned.

4. It is not known whether Attorney General McGranery kept any personal record or list with respect to the program. In any event, the existence of any such "book" was not made known by the Attorney General to the Board of Immigration Appeals or the Immigration and Naturalization Service.

5. It is not known whether Attorney General McGranery ever made a public or written statement that the program was concerned solely with expediting cases.

6. As set forth on page 4 of the affidavit, verified May 10, 1954, by Lester Friedman, the Attorney General's program has been loosely referred to as one in which a "list" was involved. However, no actual list was ever prepared or distributed. It has not been uncommon to refer to cases included within the Attorney General's program as cases "on the Attorney General's list"; however, that phrase arose through the coincidental choice of that term and not because any actual list existed.

Response to Interrogatories

7. It was neither usual nor unusual to include cases within the Attorney General's program in advance of a final order of deportation. As the facts in each case were submitted to the Attorney General for consideration, the case was either added, or not added to the program without reference to the stage in any deportation proceedings and without reference to whether any such proceedings were still pending or completed.

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8. The relator Joseph Accardi was included within the Attorney General's program.

9. It is conceded that Assistant United States Attorney William Sexton stated that the relator was included on the Attorney General's list of alien deportees because of the casual use of that language to describe the Attorney General's program.

10. It is not known when the relator's name was first included within the Attorney General's program. However, it can be stated that his name was included after all of the adverse administrative decisions against him except the final order of the Board of Immigration Appeals, which was made on April 3, 1953. The relator's name was added to the program prior to April 3, 1953 and subsequent to September 1952.

11. It is not known whether or when the inclusion of the relator's name in the Attorney General's program was made known to the Board of Immigration Appeals. If that information is obtained, it will be made known to the relator.

Response to Interrogatories

12. As set forth in the affidavit of Lester Friedman, verified May 10, 1954, commencing with the last paragraph on page 3 thereof, the Attorney General's program was commenced by the submission of detailed reports on numerous cases to the Attorney General for review. It is not known which official or officials during the past years have had occasion to review such reports, nor can such information be readily obtained because of the long period of time involved. No particular criterion was used for including the names of aliens within the program other than the facts in the particular cases indicated that the interests of the United States were sufficiently gravely involved to warrant expeditious attention and no unnecessary delay.

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13. The program of the Attorney General is not a program to deport, but a program to expedite the consideration of deportability. To this extent, the relator was included within the Attorney General's program. Of course, once an alien has been finally found deportable, then the program would require that deportation arrangements be completed as expeditiously as practicable and without unnecessary delay.

14. The Commisioner of Immigration and Naturalization did not maintain a "list" of persons within the Attorney General's program, but was concededly aware of the program and the persons included within it.

15. No "list" is known to have existed at any time with reference to the names of persons included in the Attorney General's program.

Response to Interrogatories

16. It is not known whether relator or his attorney were advised that he was within the Attorney General's program at the time he argued orally before the Board of Immigration Appeals.

17. It is not presently known whether the Board of Immigration Appeals was notified that the relator herein was included within the Attorney General's program. That information will be obtained, if available, and furnished the relator.

18. This interrogatory is incomplete and cannot be answered.

19 and 20. It is not known whether anyone connected with the enforcement of the Attorney General's program communicated directly or indirectly with the Board of Immigration Appeals with reference to the program in connection with the relator's case. However, it is conceded that it was usually common for requests to be made to the

Board of Immigration Appeals by the representative of the Immigration and Naturalization Service to expedite consideration of a large number of cases including those, for example, of detained aliens, and exclusion cases, as well as those included within the program.

21. Attorney General Brownell did continue the program of Attorney General McGranery to expedite and tolerate no delay in the more serious type of deportation cases.

22. It is not known whether the Attorney General or anyone within the Department of Justice considered the

relator to be a racketeer and a nationally known hoodlum, except in so far as such information may have been made public by press releases with which the undersigned is not familiar.

23. The relator's background of arrests and convictions warrant his being considered a member of the criminal classes. It is not known what additional information led any official in the Department of Justice to conclude that the relator is a "racketeer and a nationally known hoodlum". The undersigned has no authority to disclose what information, if any, is contained in the confidential files of the Immigration and Naturalization Service concerning relator's activities after 1945, nor are such matters relevant to the instant proceeding since such information was not furnished or known to the Board of Immigration Appeals.

24. It has been the policy of the Department of Justice to concentrate upon cases of alien racketeers and to expedite determination of their deportability, and to deport them promptly if finally ordered deported.

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25. Yes.

26. The same priority in the handling of cases within the Attorney General's program was given as existed in all other classes of cases wherein expeditious action was required, such as detained cases and similar matters.

27. Yes to the same extent that a confidential file is maintained with reference to every single case pending befor the Immigration and Naturalization Service.

Response to Interrogatories

28. No.

29. Records are maintained to show when confidential files are transmitted to the Board of Immigration Appeals and the Board customarily includes within its decision the fact that it was based, in whole or part, upon the contents of such confidential file on issues of discretionary relief. The records of the relator's case indicate that no such file was forwarded or made available to the Board of Immigration Appeals.

30. It is not known how many cases are presently included within the Attorney General's program since cases are constantly being added and removed, and it would require a physical count from day to day to furnish such information.

31. No statistical data is known to exist from which this interrogatory may be answered.

32. No statistical data is maintained from which this interrogatory may be answered. However, some cases within the program, as examples, have been included commencing at the foot of page 5 in the affidavit of Lester Friedman verified May 10, 1954.

33. No statistical data is maintained from which this interrogatory may be answered.

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34. No statistical data is maintained from which this interrogatory may be answered.

35. The Department of Justice has issued press releases in cases within the program after final orders of deporta-

tion have been made. It is not known whether this is the usual practice or has merely occurred from time to time.

36. It is not known whether the Department of Justice has ever issued a press release in a program case wherein the alien has been permitted to remain in the United States.

37. The only written order known to the undersigned which was distributed to the Board of Immigration Appeals concerning the scope of the program has been set forth in paragraph numbered 14 of the return to the writ of habeas corpus herein.

38. No statistical data is known to exist from which this interrogatory may be answered. However, it is assumed that it would be comparatively rare for an alien within the Attorney General's program to be granted the discretionary privilege of suspension of deportation. That form of discretionary relief is reserved for particularly meritorious cases and aliens who can establish a high degree of merit. Obviously, all aliens within the Attorney General's program have some unfavorable or unsavory factors in their background which would make it more difficult for them to establish the type of merit which would warrant the granting of relief; but this is true not because of the Attorney General's program, but because of their own past conduct. It is apparent that if an alien has a

criminal record and has furnished a tenuous and unsatisfactory explanation of his affluence in recent years that the Board of Immigration Appeals and the Attorney General would very likely, independently of the other, reach the

same conclusion that such alien did not merit the granting of suspension of deportation.

39. It is not known what statements, if any, the Commissioner of Immigration and Naturalization made concerning the relator's case. However, it is inconceivable that the Commissioner could have made any statement to the effect that nothing could be done for relator until his name was removed from the Attorney General's "list" since many aliens included within the program have been the beneficiaries of favorable administrative action of some kind.

40. The Board of Immigration Appeals is on the distribution list of all press releases emanating from the Department of Justice.

41. It is not known whether such press releases are actually circulated among all members of the Board beyond being available to them for examination if they so desire.

42. It is not known whether the Board of Immigration Appeals read the press releases concerning Attorney General McGranery's program, but the Board undoubtedly received such press releases.

43. The Board of Immigration Appeals was aware of the Attorney General's program.

44. The Attorney General at no time advised the Board

of Immigration Appeals of his wishes or attitude with

reference to the judgment or discretion of the Board, nor did the Board have any policy with reference thereto. The Board is and has been bound only by official precedent decisions of the Attorney General of the United States on questions of law or interpretation of statutes, regulations, and other related actions.

45. The Board of Immigration Appeals, prior to its administrative decision wherein relator was finally ordered deported, was not aware of any information except what appeared in the administrative deportation record and was not aware of any opinions of officers within the Department of Justice concerning the relator.

46. If the Board of Immigration Appeals at any time learned of the Attorney General's opinion of the relator, it could only have been from the press release which was issued after the Board's decision. However, it is not known whether the Board actually read such press release or ever became aware of the Attorney General's opinion.

47. The policy of expediting cases within the Attorney General's program included the expediting of cases of aliens thought to be "unsavory characters, racketeers, or particularly undesirable" as well as other classes of aliens whose backgrounds were such that the interests of the United States were deemed to be more gravely involved so that any unnecessary delay through lack of efficiency or otherwise would possibly be prejudicial to the best interests of the United States.

Response to Interrogatories

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48. It is not known by the undersigned what civil service status applies to members of the Board of Immigration Appeals nor is it known what changes, if any, have been made in such status.

LESTER FRIEDMAN

(Sworn to June 9, 1954.)

Supplemental Response to Interrogatories

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 85-78

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK,
SOUTHERN DISTRICT OF NEW YORK, *ss.*:

LESTER FRIEDMAN, being duly sworn, deposes and says that he is the same person who made and verified the Response to the Interrogatories propounded by relator herein. This affidavit is intended to supplement the answers to numbers 10, 11, 17, 19 and 20.

It has now been ascertained from an examination of all of the files and records of the Immigration and Naturalization Service that the relator herein was reported to the Attorney General by the Commissioner of Immigration and Naturalization on November 19, 1952, as a person whose case warranted consideration of possible inclusion within the Attorney General's program for the purpose of assigning priority to all further steps in the case.

The Attorney General of the United States did add the relator's case to the program shortly thereafter; on December 1, 1952, the District Director in New York was advised by the Commissioner of Immigration and Naturalization that the relator's case had been included in the Attorney General's program and was further advised that

no action need be taken thereon locally since the matter had already been submitted to the Board of Immigration Appeals.

What is most significant is that the Board of Immigration Appeals was not notified of the fact that the case had been added to the Attorney General's program and no request was made to the Board to expedite the case. Although this is a departure from what was frequently done in cases within the Attorney General's program, the file indicates that the case had already been argued before the Board of Immigration Appeals and it was assumed that the Board's decision was being written up, for which reason there was no necessity to request expeditious action by the Board.

The best evidence of the fact that no request to expedite was made to the Board of Immigration Appeals lies in the fact that the Board did not expedite its decision and actually handed down its opinion several months thereafter, in regular course. When requests to expedite were made, the Board's decisions had usually been made within two to four weeks.

It therefore appears, in the instant case, that the Board of Immigration Appeals was not informed prior to making its decision that the relator herein was included within the Attorney General's program. It further appears that no request to expedite the case was ever made to the Board.

LESTER FRIEDMAN

(Duly verified June 23, 1954.)

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Depositions of Members of Board of Immigration Appeals and Michael Horan

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil 85-78

[SAME TITLE]

Washington, D. C.
Tuesday, June 29, 1954

Depositions of Members of the Board of Immigration Appeals and Michael Horan, Special Assistant to the Attorney General, taken on behalf of the Relator in the above-entitled action, pursuant to the stipulation of the parties, before Edward M. Ford, a Notary Public in and for the District of Columbia, at the Offices of the Board of Immigration Appeals, Apex Building, Washington, D. C., at 11:00 a. m., Tuesday, June 29, 1954.

APPEARANCES:

On behalf of Joseph Accardi,
JACK WASSERMAN, Esquire;
On behalf of Respondent,

HAROLD J. RABY, Esquire
Assistant United States Attorney
Southern District of New York

Members of Board of Immigration Appeals—for Relator —Direct

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Thereupon,

ROBERT M. CHARLES
LEIGH L. NETTLETON
ROBERT E. LUDWIG
LOUISA WILSON

witnesses of lawful age, were duly sworn by the Notary Public and, being examined by counsel, testified as follows:

Mr. Wasserman: It is stipulated by counsel for the respective parties that signature of the witnesses is hereby waived.

May the record note that at the beginning of the deposition, I am addressing myself solely to the four Board Members and not to Mr. Moran.

Direct Examination by Mr. Wasserman:

Q. Are you all members of the Board of Immigration Appeals?

A. (Mr. Charles) Yes.

A. (Mr. Nettleton) Yes.

A. (Mr. Ludwig) Yes.

A. (Mrs. Wilson) Yes.

Q. Were you all members of the Board of Immigration Appeals at the time the case of Joseph Accardi was before the Board for consideration?

A. (Mr. Charles) Yes.

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A. (Mr. Nettleton) Yes.

Members of Board of Immigration Appeals—for Relator —Direct

A. (Mr. Ludwig) Yes.
A. (Mrs. Wilson) Yes.

Q. Were you aware of the Attorney General's program as announced on October 2, 1952? Now, you may want to take it one by one.

Mr. Raby: I would think that calls for individual answers, Mr. Wasserman, from left to right, if I may suggest.

Mr. Nettleton: Do you want us to fix a time when we were aware?

Mr. Wasserman: I would like to fix the time. I would like each Board Member to indicate when he or she became aware.

Mr. Charles: Repeat the question.

By Mr. Wasserman:

Q. Let me rephrase the question. Let me ask the question as follows: When and in what manner did you become acquainted with the Attorney General's program which was announced by Mr. McGrannery on October 2, 1952, with regard to the deportation and denaturalization of certain individuals?

A. (Mr. Charles) I am not in a position to answer that question specifically because of the content.

A. (Mr. Nettleton) I am unable to fix a time. It may be I knew it from the time it came out in the press. It is more likely I didn't become aware of it until much later.

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Mr. Wasserman: Can you fix an approximate date?

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Mr. Nettleton: I cannot.

Mr. Wasserman: All right. That is fine.

A. (Mr. Ludwig) I believe I became acquainted with it through the press at the time it was inaugurated, and it is my recollection that shortly thereafter I read the press release.

A. (Mrs. Wilson) I am not aware of the exact time, and I think I became acquainted with it, though, approximately at the time through the press.

Q. Does the Board recall whether or not the Attorney General's press release of October 2, 1952, was circulated among the Board Members? I might add that it has been admitted that the Board was on the Attorney General's mailing list to receive these press releases, and that it actually did receive this press release; is that correct, Mr. Raby?

Mr. Raby: That has been testified to by Mr. Funucane.

A. (Mr. Charles) As an individual, I cannot say that I read this specific press release to which you refer because it has not been shown to me.

Mr. Wasserman: Well, let me show it to you then. It is contained among the press releases in Exhibit 2 and is the first press release in Exhibit 2.

A. (Mr. Charles) I don't recall having had this press release placed in my hands at any time.

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A. (Mr. Nettleton) I can't say positively that in the distribution of this it got to me. I saw it yesterday and it refreshed my memory that I had seen it before, but when I couldn't even hazard a guess.

Mr. Wasserman: There is no desire to press you on anything you can't remember.

A. (Mr. Ludwig) I recall having seen it and read it, but when or the circumstances under which I read it I cannot say.

A. (Mrs. Wilson) I do not recall having seen it on any distribution. I did see it yesterday and I remember the contents, but whether it was from the newspaper or the press release, I couldn't say definitely.

Q. Now, was it a practice for the Board to circulate among the Board Members copies of official press releases of the Attorney General with regard to matters concerned with deportation of aliens?

A. (Mr. Charles) So far as I am personally concerned, it was not necessarily a general practice. Some of them were distributed and some of them were not.

A. (Mr. Nettleton) Occasionally press releases come to me in the process of circulation around the Board.

A. (Mr. Ludwig) I receive them occasionally. I don't know that I get all of them. Whenever I receive one, I initial it and put it in the outgoing box.

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A. (Mrs. Wilson) I receive them occasionally. I do not know whether I get them all.

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Q. I am going to ask the Board Members to read Relator's Exhibits 7 and 7-A, and ask them whether they have any recollection of having read that press release previously.

A. (Mr. Charles) It may well be that I saw these releases in the newspapers, but I don't recall having read these particular releases, as part of my official duties.

A. (Mr. Nettleton) The first one, I have no recollection of. Exhibit 7 I have no recollection of at all. Exhibit 7-A I recall the case, but whether I ever saw the press release I am very uncertain.

A. (Mr. Ludwig) It is my opinion that I have read Exhibit 7. 7-A I distinctly remember having seen.

A. (Mrs. Wilson) I have no recollection of having seen Exhibit 7. I have no recollection of having seen Exhibit 7-A, although I am reasonably sure that I read something of it in the paper.

Q. To the knowledge of the Board, was there a practice of the Attorney General to issue press releases with regard to cases which were within the Attorney General's program?

A. (Mr. Charles) I am not in a position to answer that question.

A. (Mr. Nettleton) I am well aware of the fact that the press releases come out from the Department on cases. I

have no means of knowing whether they are associated with program cases or not. Undoubtedly they were.

A. (Mr. Ludwig) I don't know anything about the practice of the Attorney General at all.

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A. (Mrs. Wilson) I am not aware of any of the Attorney General's practices.

Q. Were the Board Members aware of the fact that a request had been made by the Public Relations Office of the Department of Justice for a copy of the Board's opinion or at least to be notified of the disposition of the Accardi case when it was decided?

Mr. Raby: Mr. Wasserman, would you mind rephrasing that question to read; are the Board Members aware, or do the Board Members have any knowledge of a request by the Department of Justice for information concerning the outcome of or the decision in the Accardi case when such decision was rendered? Is that modification satisfactory?

Mr. Wasserman: Yes, I am willing to accept it.

Mr. Charles: Will you repeat the question?

(The pending question was read by the reporter.)

A. (Mr. Charles) I have no such knowledge.

A. (Mr. Nettleton) I have no such knowledge.

A. (Mr. Ludwig) No.

A. (Mrs. Wilson) No.

Q. I would like to ascertain insofar as we can and insofar

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as the knowledge of the Board is concerned, when the practice began for Mr. Rawitz to notify the Board orally that a case was within the program.

A. (Mr. Charles) I do not know.

A. (Mr. Nettleton) I don't know.

A. (Mr. Ludwig) I can't answer that.

A. (Mrs. Wilson) I do not know.

Q. Do the Board Members know when the practice began to notify the Board in writing that a case was within the program?

A. (Mr. Charles) I do not know whether such practice was ever initiated.

A. (Mr. Nettleton) I don't know.

A. (Mr. Ludwig) I have no knowledge of it.

A. (Mrs. Wilson) I do not know.

Q. Is the Board aware of whether or not that practice still exists?

A. (Mr. Charles) I couldn't answer that question. I don't believe so.

A. (Mr. Nettleton) My only knowledge about that is in the discussion of this case, and I have no knowledge of it at all other than that.

A. (Mr. Ludwig) I don't know.

A. (Mrs. Wilson) I have no knowledge either.

Q. Is there a practice with regard to detained cases to

advise the Board that an individual is detained?

A. (Mr. Charles) Yes.

A. (Mr. Nettleton) There is no means of advising the Board. The record speaks for itself. It shows whether he is detained or released.

A. (Mr. Ludwig) My answer is the same. It shows on the face of the case whether the man is detained.

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Mr. Wasserman: In other words, there is no practice of notifying the Board confidentially that the case is a rush case or that the case is a detained case?

Mr. Charles: There is not.

Mr. Wasserman: With regard to detained cases.

Mr. Nettleton: No such practice.

Mr. Ludwig: Not in confidential matters.

By Mr. Wasserman:

Q. To the knowledge of the Board, does it receive or did it receive confidential memorandum to expedite cases? I am not concerned with other types of confidential memorandum in any case other than cases within the Attorney General's program. Now, if the question isn't clear, I will be glad to repeat it.

(Discussion off the record.)

Mr. Raby: Mr. Wasserman, the Government is willing to stipulate in accordance with our understanding of the facts that ex parte communications were sent from time to time by the Office of the

Deputy Attorney General to the Board of Immigration Appeals via Mr. Rawitz of the Immigration Service, with respect to program cases, in accordance with the previously stated general request of the Department of Justice, Enforcement Division, that program cases receive expeditious treatment. The sending of a confidential or ex parte communication would have been unnecessary in the case of an

ordinary detained alien for the simple reason that the record on its face, as the testimony of the Board Members indicated, would show that the alien was a detained case, and accordingly entitled to preferred calendar treatment.

On the other hand, in the case of a program case, the Board of Immigration Appeals, as the testimony has shown, was not in possession of any so-called list of program cases and in order to get expeditious calendar treatment by the Board of Immigration Appeals, it was necessary for the Deputy Attorney General's office to communicate with the Board of Immigration Appeals for the purpose of getting such expeditious treatment, and that was done.

If I am not clear, if I haven't made myself clear so far, I will stipulate further that such communication was ex parte in the sense that the alien's attorney was not advised of that communication from the Deputy Attorney General's office to the Board of Immigration Appeals.

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Upon further reflection, Mr. Wasserman, it may well be that I have been misleading in my suggestion that the request for expedition emanated from the Office of the Deputy Attorney General. The request may have come from the Immigration and Naturalization Service, which, of course, is part of the Department of Justice, and which performs enforcement functions of the Department with respect to

aliens. Subject to that qualification or clarification, if you will, my offer to stipulate stands.

Mr. Wasserman: I am willing to accept it with the modification you just made.

Mr. Raby: Thank you.

By Mr. Wasserman:

Q. To the knowledge of the Board, was any confidential memorandum ever received in a case requesting expedition other than in the case which the Board knew to be a program case.

A. (Mr. Charles) It may well be.

Mr. Wasserman: You have no specific recollection?

Mr. Charles: I have no specific recollection.

A. (Mr. Nettleton) I have no recollection of any such case, but I would add this, I have no memory of a confidential memorandum on a case of any kind.

A. (Mr. Ludwig) This is the first time I have heard any inference that the fact that a case was to be expedited because there was anything confidential about it. I never

knew it was confidential.

Mrs. Wilson: Would you repeat the question again for me?

(The pending question was read by the reporter.)

A. (Mrs. Wilson) Not to my knowledge, but it may well have been that there were other cases.

Mr. Wasserman: You have no specific knowledge?

Mrs. Wilson: I have no specific recollection.

By Mr. Wasserman:

Q. Now, to the knowledge of the Board, was it a practice to always state in the Board's opinion when the Board was considering confidential material not of record?

Mr. Raby: Mr. Wasserman, to clarify your question, do you mean with respect to the merits of the case?

Mr. Wasserman: Yes, I mean with respect to the merits of the case, because I think it has been agreed that if it were within the Attorney General's program that would not be noted in the opinion.

Mr. Raby: Quite right.

Mr. Wasserman: I certainly accept that modification.

Mr. Nettleton: Would you repeat that question?

By Mr. Wasserman:

Q. To the knowledge of the Board, was it always a practice to state in the Board's opinion when confidential material not of record was considered by the Board in reaching its opinion?

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A. (Mr. Charles) Specifically answering that question, when confidential information not of record was considered by the Board in connection with remedial relief from

deportation, a statement to that effect appeared in the decision.

A. (Mr. Nettleton) My answer would be the same.

A. (Mr. Ludwig) Generally speaking, yes. There may have been instances, but it was the policy of the Board to so state.

A. (Mrs. Wilson) Generally speaking it was the practice.

Q. I would now like to know what the understanding of each Board Member was as to the program as originally announced by Mr. McGrannery.

A. (Mr. Charles) My only knowledge as was gleaned from the newspapers, the impression of the program was to vigorously prosecute the cases from down below.

A. (Mr. Nettleton) I understood his program was a matter of prosecution.

A. (Mr. Ludwig) Well, insofar as the Board was concerned, the only thing I understood was the cases we were notified were on the list, were were to expedite our decision.

A. (Mrs. Wilson) It is my understanding that the Attorney General's program was a question of prosecution.

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Q. To the knowledge of the Board, did Mr. McGrannery ever tell the Board orally or in writing that the program was one merely to expedite cases?

A. (Mr. Charles) I have no knowledge of Mr. McGrannery communicating with me personally at any time.

Mr. Wasserman: Well, I am talking about directly or indirectly.

Mr. Charles: Either directly or indirectly.

Members of Board of Immigration Appeals—for Relator —Direct

A. (Mr. Nettleton) I have no knowledge of any communication, direct or indirect, from Mr. McGrannery, but the word did come that these cases were to be expedited.

A. (Mr. Ludwig) Mr. Nettleton's answer covers mine in full.

A. (Mrs. Wilson) I have no knowledge directly or indirectly.

Q. At the time of the Accardi decision, does any Board Member have a recollection as to whether or not he then knew the case was within the Attorney General's program?

Mr. Raby: Mr. Wasserman, would you be good enough, sir, to give the date of the decision.

Mr. Wasserman: The date of the decision was April 3, 1953.

A. (Mr. Charles) On the date of the rendition of that decision, I had no personal knowledge that such was the

situation.

A. (Mr. Nettleton) I have no knowledge at this time whether I knew or not. I may have known, but I couldn't say.

A. (Mr. Ludwig) I can't say with definiteness, but it is my opinion that on April 3rd at the time the decision was rendered, I knew that Accardi was on the list.

A. (Mrs. Wilson) I have no recollection that I knew he was on the list, whether or not he was on the list.

Q. Do the Board Members recall whether or not the case was taken up in conference before the full Board prior to decision?

Members of Board of Immigration Appeals—for Relator —Cross

A. (Mr. Charles) I cannot answer that definitely.

A. (Mr. Nettleton) I do not know.

A. (Mr. Ludwig) My answer is the same as it was before. I have no knowledge, but it is my opinion and my thought that it was, although I cannot answer it with definiteness.

A. (Mrs. Wilson) I think it was taken up in conference in routine manner before the decision was rendered.

Mr. Wasserman: I have no further questions.

Cross Examination by Mr. Raby:

Q. In similar manner, I am addressing my questions to the Board panel and request individual answers in each

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case. Did you at any time receive any communication relative to the Accardi case when you had it under advisement from the Attorney General or any of his subordinates or from any person in government service relative to the merits of the case or how the case should be decided on the merits?

A. (Mr. Charles) The answer to that question is definitely not.

A. (Mr. Nettleton) No.

A. (Mr. Ludwig) No.

A. (Mrs. Wilson) No.

Q. Did you receive any communications from the Attorney General or any of his subordinates or anybody in the government service relative to the merits of any other case that you may have had under advisement between De-

tober 1952 and April 1953, indicating that the case should be decided adversely to the alien?

A. (Mr. Charles) No.

A. (Mr. Nettleton) No.

A. (Mr. Ludwig) No.

A. (Mrs. Wilson) No.

Q. Specifically did Mr. Michael J. Horan or Mr. Thomas Dunnigan, of the Department of Justice, ever communicate with any member of this Board relative to the merits of any pending deportation case?

A. (Mr. Charles) So far as I am concerned, no.

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A. (Mr. Nettleton) No.

A. (Mr. Ludwig) No.

A. (Mrs. Wilson) Not with me.

Q. Did you interpret or construe any press release or public announcement by the Attorney General relative to an alien whose case was pending before your Board during 1952 or 1953 as an indirect intimation, suggestion or hint from the Attorney General that you as Board Members should decide the case adversely against the alien, aside and apart from the record?

A. (Mr. Charles) My determination of any case is predicated solely upon the content of the record.

A. (Mr. Nettleton) The answer to your question is no.

A. (Mr. Ludwig) My answer is no to the first part, and I would also like to state that I have never had any feeling of any influence at any time in any way upon any decision I have made.

A. (Mrs. Wilson) My answer is no.

Members of Board of Immigration Appeals—for Relator —Cross

Q. Now, I am addressing the next question to those members whose recollection is not clear as to whether or not they had knowledge of the fact that Mr. Accardi's name was on the Attorney General's program while the case was under advisement. Since some of you have indicated a belief that you may have been aware of that fact. I am going to assume that to be a fact, and I am going to ask, assum-

ing that you knew that Mr. Accardi was on the Attorney General's program, would that fact of itself in any way have influenced your decision on the merits of the case?

A. (Mr. Charles) No.

A. (Mr. Nettleton) Not at all.

A. (Mrs. Wilson) No.

Q. Would you have construed the inclusion of Mr. Accardi's name on the Attorney General's program as a dictation by the Attorney General of an adverse decision?

Mr. Charles: Would you repeat that question?

(The pending question was read by the reporter.)

A. (Mr. Charles) I have no knowledge that his name was on such program.

A. (Mr. Nettleton) I would not so construe it.

A. (Mr. Ludwig) No.

A. (Mrs. Wilson) No.

Mr. Raby: No further cross.

Mr. Wasserman: The operation is over.

(Witness excused.)

Michael J. Horan—for Relator—Direct

Whereupon,

MICHAEL J. HORAN, a witness of lawful age, having been duly sworn by the Notary Public and, being examined by counsel, testified as follows:

Direct Examination by Mr. Wasserman:

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Q. Mr. Horan, what is your official capacity in the Department of Justice?

A. Special Assistant to the Attorney General.

Q. And what is your connection with the so-called Attorney General's program with reference to denaturalization and deportation of aliens?

A. I assisted Mr. Thomas J. Donegan in the administration of the program.

Q. Were you with the program from its very inception? Were you associated with the program from its very inception?

A. Yes.

Q. Do you want to add anything to that?

A. Well, it probably would be superfluous, but to the best of my knowledge I was associated with it from its inception.

Q. Did you become associated with the program prior to October 2, 1952?

A. No.

Q. You became involved in the program at the time it was announced by the Attorney General; is that correct?

A. What date was that?

Q. October 2, 1952.

A. No.

Q. I am not clear. Is that the date you became associated with it?

A. No.

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Q. What was the date you became associated with the program?

A. I would have to check my records, but as I recall, it was in the middle of October, around the 12th, I would say, between the 12th and the 20th.

Q. Now, in connection with the program, do you recall or do you know or do your records show when Mr. Accardi was placed on the Attorney General's list or within the program?

A. I believe his name was included under the program on November 19th or 20th, 1952.

Q. Now, in conjunction with the Attorney General's program, was it a practice to issue press releases in connection with the cases within the program?

A. Yes.

Q. To your knowledge was any press release ever issued indicating that action had been taken by the Attorney General permitting an alien to remain permanently in the United States?

A. Not to my knowledge, but bear in mind I am not in the Office of Public Information, and naturally all of these questions are to the best of my knowledge.

Q. I realize that, and I so stipulate, and I so understand your answers.

Now, to your knowledge were cases within the program to be treated in the same way from the point of view of

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the expedition, let us say, as detained cases, or was some special priority even over detained cases to be given to cases within the program?

A. I think there are several questions there. Would you mind breaking it down?

Q. I don't mind your taking it and answering which portions you want and separating them.

A. I think it would be clearer.

Q. What I had in mind was this: I understand from the testimony here that priority in the handling of cases was to be given cases within the program. I want to know whether or not it was the same type of priority or expedition as detained cases were given or whether some sort of top priority was not to be given to cases within the program.

A. They were to be given priority; as to a relative matter to other types of cases, I can't answer, but they were to be given priority.

Q. Now, the procedure, as I understand it, was for the Commissioner of Immigration to request you to place a name within the program; is that correct? Or let me put it another way, will you tell us what the mechanics were of placing a case within the program, and just what you did after you placed the case within the program?

A. At the beginning there was a nucleus of a number of names, which were handed to us by the Attorney Gen-

eral. As to how many or just what names were in that group, I can't say without checking the records. From that time on, names were added to the program by any of the divisions that had a part in the coordination of the program. I mean by that, the recommendations for adding a name to the program could come from the Immigration and Naturalization Service, it could come from the FBI, it could come from the Criminal Division, or it could come from the Deputy Attorney General's office.

Q. Now, who placed the case within the program? Whose decision was it?

A. When the recommendation was made, if there is no dissent from any of the representatives of the interested divisions, the name was placed on the program.

Q. By whom?

A. By the Coordinating Committee.

Q. And who did the Coordinating Committee consist of?

A. The Coordinating Committee consisted of Thomas J. Donegan as Chairman, myself as his assistant, representatives from the Immigration and Naturalization Service, the FBI and Criminal Division.

Q. Is that still the same composition with the exception of Mr. Dunnigan?

A. No, it is not.

Q. Is there still a committee passing on it?

A. There is not.

Q. How is it handled now?

Mr. Raby: Is that relevant?

Mr. Wasserman: No. If you object to it, I won't ask it.

Mr. Raby: I would prefer not to probe it. Of course, we don't have a judge here to rule on objections.

Mr. Wasserman: I am not going to ask any questions that you object to, let's understand that.

Mr. Raby: May the record show I object to that on the ground it is completely irrelevant.

Mr. Wasserman: I withdraw the question. We are not going to have any fight.

By Mr. Wasserman:

Q. Was there any way of petitioning to get a name off the list? Let me rephrase it. Once a name was placed on the list, was it ever taken off?

A. There were names which were included in the program which were subsequently closed as to those cases.

Q. Closed because of final action taken; is that the idea?

A. Closed for several reasons. There could be a number of reasons.

Q. What would be the typical reasons?

A. One would be the death of the individual.

Q. Yes.

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A. Another could be that investigation showed that the person was a valid derivative citizen, as you know puts them in the same status as a native born citizen. Another situation could be that investigation disclosed he was native born. Investigation disclosed there was no evidence which made him appear amenable to either the immigration and naturalization laws.

Q. Now, after this Coordinating Committee placed the case within the Attorney General's program or on his list, and I am using the term list in the broad sense which the Department would have me use it, just what was done by your office? To whom did you communicate that fact?

A. Would you mind saying what you mean by my office? Do you mean in my capacity as assistant to Mr. Donegan or the Deputy Attorney General's Office?

Q. Your coordinating committee. In other words, let's take the Accardi case. On November 19th or 20th he was placed within the program by your Coordinating Com-

mittee, which consisted of what? How many individuals, would you say, approximately?

A. I enumerated the divisions. The divisions always had at least one representative there, sometimes two.

Q. So that how many individuals would you have at minimum and maximum? I just want to get the range.

A. Well, there would be a minimum of a representative

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from each division named, plus Mr. Donegan and myself.

Q. So there would be at least five or six individuals and maybe sometimes ten; is that correct? I am just interested in approximate figures.

A. I don't think the number was ever as high as ten, not to my recollection.

Q. It would be under ten, and the minimum would be what?

A. I would say five.

Q. Now, this Committee of at least five individuals met on the Accardi case or passed notes around among themselves and within a period of a day approved the Accardi case for inclusion within the Attorney General's Program; is that correct?

A. That is your statement of it. I don't think that is exactly it.

Q. I don't want to put words in your mouth. This was my understanding from what you have told me. I would like you to correct me and elucidate on it.

A. What is your question specifically?

Q. As I understand it, on November 19, 1952, your office, and when I say your office, the Coordinating Committee, received a request from the Commissioner of Immigration to include Accardi within the program; is that correct?

A. He was included under the program as of, as I said, it was either November 19 or 20, as I recall.

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Q. Now, was that in response to a request by the Commissioner of Immigration?

A. As I recall, his inclusion under the program was upon the recommendation of the Immigration and Naturalization Service.

Q. All right. Now, when that recommendation came in, was that recommendation considered by the Coordinating Committee?

A. Yes.

Q. In other words, this Coordinating Committee of five individuals passed on that recommendation; is that correct?

A. Well, I don't want to pinpoint the five. I said that there was usually between five and nine persons present.

Q. Yes. I will withdraw the word five. Did the Coordinating Committee pass on the recommendation to place Accardi within the program?

A. Yes.

Q. Then he was included within the program; is that correct?

A. That is correct.

Q. Now, some communication went from the Committee indicating that Mr. Accardi was within the program; is that correct?

A. Went from the Committee?

Q. Well, I withdraw the question. What happened after

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Accardi was included within the program? Who received notice of that fact?

A. Thereafter the Immigration and Naturalization Service would include his case among those that were reported weekly on the status of each case under the program. Such reports would go to the Attorney General and the Deputy Attorney General for Mr. Dunnigan and my attention, copies would go to the Criminal Division, and to the FBI.

Q. So that between November 19th or 20th, 1952, and April 3, 1953, weekly reports were rendered with regard to Joseph Accardi to the individuals or divisions you have just specified.

A. Yes, sir.

Q. Now, what would those reports state normally?

A. Well, they would give the status and any progress that had been made under the case, any significant developments.

Q. Now, were any normal lists kept by you or any members of the Coordinating Committee indicating which cases were within the program?

A. Well, it is according to what you mean by list. I have no list as such. I have never seen a list as such. There were the reports, as I stated before, and they were maintained by each of the interested divisions; that is, copies of the reports covering each case under the program.

Q. But you have what would amount to a card index of cases within the progress, have you?

A. They serve the same purpose, yes.

Q. In other words, you could make up a list from the material in your office to indicate which cases are within the program and which cases are not?

Mr. Raby: I might say that has been stipulated in the pleadings, Mr. Wasserman.

Mr. Wasserman: Fine.

By Mr. Wasserman:

Q. Now, what sort of a communication was transmitted to the Immigration Service after Accardi's name was placed within the program? Did you send an inter-office communication, or just what was sent?

A. I recall no communication to the Immigration and Naturalization Service.

Q. Well, how would they get advice to the effect that you had approved their recommendation? Would they be notified?

A. Well, from the time that an individual's name was included within the program, the Immigration and Naturalization Service was obliged to make weekly reports on the status of the case. In addition, if the case were in litigation, the Criminal Division would also make a weekly report.

Q. I am afraid you don't get my question.

Mr. Raby: Mr. Wasserman is trying to find out the mechanical means by which you first tipped off the Immigration Service to the effect their recommendation had been adopted and from there on it

would be treated as a list case?

A. They were advised at the meeting at which the name was presented.

Q. They had a representative present; is that correct?

A. I stated that before.

Q. I was wondering whether or not subsequent to the meeting there was a formal written communication to the Immigration Service. Now, am I correct in my understanding there was no formal written communication to the Immigration Service; they merely had their representative report back that at a Committee meeting of November 19th or 20th, 1952, the recommendation of the Immigration Service to place Accardi within the program had been approved?

A. Yes.

Mr. Wasserman: I have no further questions.

Cross Examination by Mr. Raby:

Q. I have about three questions. Is it not a fact, Mr. Horan, that it was the practice for the Department of Justice to issue press releases regarding all matters of public interest?

A. To my knowledge, yes.

Q. Let me ask this question, Mr. Horan. Are you familiar with the pleadings in the Accardi case? Are you familiar with the petition for the writ of habeas corpus in the Accardi case?

A. I haven't studied it, no.

Q. Have you read the decision of the United States Supreme Court?

A. Yes.

Q. Do you recall the language of the United States Supreme Court wherein the Court stated that the alien was entitled to a hearing as to whether or not the Attorney

General had dictated the decision of the Board of Immigration appeals?

A. Yes, words to that effect.

Q. You recall that.

Now, let me ask you this: Did you at any time or to your knowledge did anybody else in your Committee or in the office of the Deputy Attorney General or any other branch of the Attorney General ever communicate with the Board of Immigration Appeals and suggest to the Board how the case should be decided on its merits?

A. No.

Mr. Raby: I have no further questions.

Mr. Wasserman: He is answering, of course, as far as his knowledge is concerned.

The Witness: That is all I can answer to any of these questions.

Mr. Wasserman: I am through.

(Thereupon, at 12:00 noon, the taking of the deposition was concluded.)

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Trial Minutes

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 85-78

[SAME TITLE]

Before:

HON. JOHN F. X. McGOHEY,
District Judge.

New York, June 23, 1954,
10.30 a. m.

APPEARANCES:

JACK WASSERMAN, Esq.,
Attorney for Relator.

J. EDWARD LUMBARD, Esq.,
United States Attorney,
for the Respondent;

By Harold J. Raby, Esq., Assistant
United States Attorney, and
Lester Friedman, Esq., Attorney, Immigration
and Naturalization Service.

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Opening Statement for Relator

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Mr. Wasserman: May it please the Court, this is an action arising in habeas corpus proceedings to review a deportation order entered on April 3, 1953.

The case is here after remand from the Supreme Court. The Supreme Court directed the issuance of a writ of habeas corpus on March 15, 1954. And the case is reported in 347 U. S. 260.

The petitioner is a native citizen of Italy, who last entered the United States in 1932, and who now has a residence here of some 21 or 22 years. He is married to a lawful resident of the United States and has a 2-year old native born child.

In 1945 the Board of Immigration Appeals found him deserving of permanent residence and authorized him to proceed to Canada to secure a visa through a procedure known as pre-examination. He was unable to complete that procedure because he had a suspended sentence in 1940 and it was necessary to secure a waiver for the suspended sentence.

The petition alleges that he has been a person of good moral character for the past ten years and that appears to be undenied as far as reading the papers, but moreover, and more important, the Board of Immigration Appeals found that he has been a person of good moral character for the past five years.

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He has two arrests which occurred in 1933, which did not result in convictions, and this 1940 suspended sentence for violation of 18 U. S. C. 88.

He has been ordered deported upon the ground that he entered the United States in 1932 without a visa. Notwithstanding the finding of his good moral character, his long

residence here and his family ties, the Board, without assigning any reasons, refused to grant the petitioner discretionary relief.

The petition alleges that the Attorney General decided to deport the petitioner in October of 1952, which was prior to the Board's decision, and, accordingly, that his case was prejudged in advance of the Board's decision of April 3, 1953. That is paragraph 19 of the complaint.

It also alleges that in view of the press releases and announcements by the Attorney General that the petitioner Accardi could not secure fair reconsideration of his case after April 3, 1953.

The Supreme Court decision in this case states as follows:

> "That the petition for habeas corpus charges the Attorney General with precisely what regulations forbid him to do, dictating a Board's decision. The peti-
>
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>
> tion alleges that the Attorney General included the name of petitioner in a confidential list of unsavory characters whom he wanted deported. Public announcements clearly revealed that the Attorney General did not regard the listing as a mere preliminary to investigation and deportation. To the contrary, those listed were persons whom the Attorney General planned to deport."

I plan to show by documentary proof and the testimony of Mr. McGranery, whose oral deposition has been taken, what the nature of the so-called Attorney General's program was, that it was a program to deport certain named individuals, including this petitioner Accardi.

The Government now contends, however, that this was merely a program to expedite the consideration of cases rather than a program to deport certain named individuals, a theory which, I submit, will not be supported because I do have documentary proof to establish just what the Attorney General's program was.

I might say, further, that in his oral deposition which I took on Monday at Mr. McGranery's office, Mr. McGranery admitted in so many words that he had prejudged the case. He admitted that prior to the Board's decision he had received confidential reports and that he had made up his

mind that Accardi was a racketeer and that he had made up his mind to deport Accardi.

I filed interrogatories, which have been answered. There is a return and there are affidavits which are in the record. Some of them haven't been filed. These papers admit that Accardi was within the Attorney General's program. It is also admitted that Accardi was placed on this program prior to the Board's decision. It is also admitted that the Board knew just what the Attorney General's program was.

If the program was a program to deport rather than one merely to expedite cases, I submit that the writ should be granted.

And I also submit that it was absolutely impossible, and I think these records will establish even more clearly, it was absolutely impossible for Accardi to secure fair re consideration of his case after these press releases had been issued and after the Attorney General had publicly announced that Accardi was a racketeer and we, of course, deny that he was a racketeer.

The Attorney General made that announcement the same day the Board rendered its decision. So you have a situation where the Board says,

"Accardi is a person of good moral character."

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On the same day the Attorney General issues a press release saying Accardi is a racketeer. I submit that those two announcements, those two decisions, are absolutely inconsistent and it did render, at least clearly there, fair reconsideration of the case impossible. And a petition was filed for reconsideration.

By agreement with the Government I have reserved the right to take the testimony of the other board members aside from Mr. Finucane, the Chairman, who is presently here in court. If, after Mr. Finucane's testimony it is believed necessary that that testimony or deposition will be necessary in order to complete the picture of the case, we are anxious to get the full facts before the court, or Mr. Finucane cannot answer all the questions as far as the Board is concerned, I will just make a request at the end of the testimony that the testimony of the other two board members be taken.

I don't know whether the Government has yet filed its return and the affidavits. If it proposes to do so, I would like to make a motion directed towards striking two paragraphs of—one—the answer, and one paragraph of the return.

Is there any objection to my presenting that to the Court at this time?

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I will tell you exactly what I have in mind. In the answer and in the return—

Colloquy

The Court: Pardon me. Will you wait just a minute, please?

Mr. Wasserman: Yes, sir.

The Court: I don't know whether I have a writ or not here.

Mr. Raby: Your Honor, I was about to hand up the papers as soon as Mr. Wasserman finished speaking. I did not like to interrupt his presentation.

The Court: All right, let me have the writ.

Mr. Raby: With the Court's permission, I would like to hand up the original writ of habeas corpus, which was issued in May of this year, and the original return to the writ of habeas corpus, an affidavit—

The Court: Copy of the return has been served on your adversary?

Mr. Raby: Yes; all these papers have been served on my opponent. The next document is an affidavit submitted in connection with the return, executed May 10, 1954, signed by Lester Friedman.

The next document consists of responses to interrogatories previously served in this case. The responses are sworn to June 9, 1954. And, finally, the supplemental re-

sponse to interrogatories, sworn to today, June 23, 1954.

Now, before Mr. Wasserman presents any motions to move to strike anything that is in the return, I would like a brief opportunity to make an opening statement similar to his.

The Court: I will tell you what I would like. I would like to have a brief opportunity to read the papers.

Mr. Raby: Yes.

The Court: I think that will be more helpful.

Mr. Raby: Yes, sir.

(A pause.)

The Court: I don't seem to have a copy of the traverse to the return.

Mr. Wasserman: It was filed.

The Court: Maybe it is here.

Mr. Wasserman: I have these two extra copies, if that will assist your Honor.

The Court: Just a minute.

Mr. Wasserman: There is also an affidavit, if your Honor pleases, and a traverse, which was filed.

The Court: I have them here.

(A pause.)

The Court: Very well, gentlemen. Thank you.

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Now, you had some statement you wanted to make, Mr. Raby?

Mr. Raby: Yes.

May it please your Honor, at the outset, I would like to emphasize that under our existing immigration laws the Attorney General occupies a dual capacity. He is the enforcement officer vested by Congress with the duty of taking into custody and deporting aliens found in the country in violation of the immigration laws. He is also, however, vested with quasi judicial authority in the sense that he is authorized to recommend the dispensing of deportation, suspension of deportation, to Congress in the case of those aliens who, having been found to be deportable, are in the opinion of the Attorney General worthy of that most extraordinary piece of executive grace.

I mention this, your Honor, because it could be inferred from my opponent's commencing argument this morning

that somehow or other it was error for the Attorney General to read any adverse reports concerning this or any alien whose case was pending, or to make any unfavorable public statements concerning the case of any alien, including Accardi, whose case the Attorney General may eventually have to pass upon.

I think that a reading, the most cursory reading, of the

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opinion and decision of the Supreme Court in this case, namely, the Accardi case, indicates that that is not the issue presented here at all.

There was no question in the mind of the Supreme Court as to the right of the Attorney General to exercise these dual powers. The issue turns on the question of alleged dictation by the Attorney General of the decision of the Board of Immigration Appeals contrary to the Attorney General's regulations.

So, as I understand the issue of fact which is presented to this Court at this time on remand from the Supreme Court is whether or not the Attorney General, who admittedly had a program to expedite the deportation proceedings relative to aliens of the so-called racketeering, criminal and subversive classes, had in this particular case improperly said to the Board of Immigration Appeals, which then had the case under advisement, that "Mr. Accardi is on my list, on my program, and I want you to decide it my way."

That, it seems to me, is the issue of fact presented, and I think that that issue is perhaps graphically displayed in paragraphs 15 and 16 of the petition for the writ because in that document it is stated, and I am quoting paragraph 15,

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"Upon information and belief the aforesaid list of 100 individuals, including the name of my husband, was circulated by the Department of Justice among all its employees connected with the Immigration Service and the Board of Immigration Appeals."

Paragraph 16,

"Upon information and belief that because of the listing of my husband's name on this confidential list, and because of consideration of matters outside the record of his immigration hearing, discretionary relief has been denied to permit my husband to adjust his immigration status to that of a permanent resident."

The argument—

The Court: Pardon me just a minute. The Accardi case, you say, is in 347?

Mr. Raby: We have a copy of it, sir. It is on page 260, Volume 347.

As to these allegations, we will prove that—

The Court: Would it inconvenience you if I just read this?

Mr. Raby: Not at all.

The Court: What page?

Mr. Raby: Page 260.

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(A pause.)

The Court: Very well.

Mr. Raby: Your Honor, I was about to state that we will prove, in the first place, that Mr. McGranery, Judge McGranery, the then Attorney General, did not in this case, nor did Mr. Brownell, at any time communicate with the

Board of Immigration Appeals and suggest to them, directly or indirectly, how he wanted the case decided on the merits.

We are prepared also to prove that the Board of Immigration Appeals decided the case on its own merits; that it was not influenced by any press releases that may have been issued, irrespective of whether those press releases were read by the Board of Immigration Appeals or any members thereof, and I think that such proof will dispose effectively of the contentions made in the petition which the Supreme Court has given this petitioner an opportunity to prove.

I might say in passing, Judge McGohey, that the mere existence of this program itself, or the mere public announcement of the existence of this program to expedite deportation is not, as I understand the Supreme Court, in itself fatal because, if it were, then there would have been no occasion for a hearing, and, I might say, in that connection, that a few weeks ago Judge Thomas Murphy, in

the case of Matranga, Civil No. 92-164, decided a similar case after hearing testimony of the same witness who is here this morning to the effect that the case had not been prejudged adversely to the alien; and insofar as a question of law may be presented on the allegation that, as a matter of law, the public announcement of the existence of a program, and the fact that the name of Mr. Accardi or any other alien may be on the program, infects the proceeding with unfairness, Judge Murphy didn't so find, and an application to the Court of Appeals for a stay of deportation was denied, with the result that Mr. Matranga, who attempted to ride the Accardi bandwagon, so to speak, was deported.

I think that is all I need to say at this time, except just one additional possible point, and that is this, your Honor, that if by any chance you were to hold that the circulation among the Board members of press releases—which we contend is proper—were you to decide that that is improper, I think that the situation would be adequately and completely corrected by a representation by the Chairman of the Board of Immigration Appeals that he was not influenced by any such assumed impropriety in the same way your Honor would correct an inadvertent reading, let us

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say, of a newspaper article by a juror in a criminal trial.

Mr. Wasserman: I would just like to say one thing in reply.

I have read the complete record in the Matranga case, the testimony which was adduced at that hearing; I have also read Judge Murphy's decision this morning, and you will find that, on the record presented to Judge Murphy, he found that the Attorney General's program was merely a program to expedite cases.

I think the overwhelming documentary evidence which will be introduced in this record will show that that was not a program to expedite, but that it was a program to deport. Unlike the Matranga case, I am in a position to prove just what the program was. We do have Mr. McGranery's testimony, which was not adduced in the Matranga case. I do have all the original press releases which were circulated to the Board of Immigration Appeals, which were also not adduced in the Matranga case.

I needn't say; your Honor is going to decide this case on this record, not on the Matranga record.

The Court: All right, call your witness.

Motions

Mr. Wasserman: Before I start with the presentation of my documentary evidence, I do want to make motions. They are both motions to strike.

I refer your Honor to Answer No. 37 of the Govern-

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ment's answer to my interrogatory—I am sorry, it is 39. I have no objection to the first statement, which is—

> "It is not known what statements, if any, the Commissioner of Immigration and Naturalization made."

The Court: Just a minute, please.

39?

Mr. Wasserman: 39, your Honor.

The Court: The question is, did the Commissioner of Immigration ever tell anyone (a) that Joseph Accardi was on the Attorney General's list, and (b) that nothing could be done for him until his name was taken off the list.

Mr. Wasserman: That is correct.

The Court: Let me see what the answer is.

Mr. Wasserman: I don't object to the first sentence. I do object to everything thereafter.

The Court: Oh, that is only argument.

Mr. Wasserman: What was that?

The Court: That motion is denied. The rest of that answer is merely argument. We haven't got a jury here. You are trying this case before a Judge.

Mr. Wasserman: I think I have adequately conveyed my objection to the Court on that. Now—

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The Court: You have, but the whole point is the rest of that answer is a conclusion by whoever answer these, and it is argumentative.

Offering of Exhibits

Mr. Wasserman: As long as the Court will so regard it, I have no objection to having my motion denied.

Paragraph 14 of the return—

The Court: Yes.

Mr. Wasserman: The Government sets forth a letter of April 23, 1954, a letter which was circulated within the department after this litigation was begun and after this case was decided in the Supreme Court. I might say that the Government attempted to introduce that letter in evidence in the Matranga case and Judge Murphy ruled it was inadmissible. They are seeking by means of the return to do what Judge Murphy did not permit them to do in the Matranga case. I am objecting to its consideration.

The Court: I will allow that to stay in there, too. And as I understand that, it is conceded that this was written and circulated in April, 1954, after this litigation started, and the argument is that they then formalized what had been the informal rule before.

Mr. Wasserman: That is right.

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The Court: That is their claim. I don't know whether it was or not. You may argue against it, but if that is a motion to strike out, I will deny the motion.

Mr. Wasserman: I now offer in evidence the oral deposition of Mr. McGranery.

The Court: Very well.

Mr. Raby: No objection.

(Marked Relator's Exhibit 1.)

Mr. Wasserman: I also would like to offer in evidence an affidavit which I executed, which annexes to it the vari-

ous press releases concerning, one, Mr. McGranery's original announcement of October 2, 1952, followed by all the press releases concerned with this particular case.

I might add—

The Court: Press releases by whom?

Mr. Wasserman: By the Department of Justice.

I might say to your Honor that this affidavit has annexed all the press releases—

The Court: You are really offering only the press releases?

Mr. Wasserman: Yes.

The Court: The affidavit, I take it, is simply to show they came from newspapers and regular sources?

Mr. Wasserman: No, these were the—

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The Court: The originals?

Mr. Wasserman: —the originals issued by the Department of Justice which—

The Court: You are only vouching for their authenticity by the affidavit?

Mr. Wasserman: Yes.

I would like to go even further, your Honor. These press releases were filed by the Department of Justice with the Supreme Court and I secured a set from the Supreme Court.

The Court: In other words, your affidavit is not the important thing. Your affidavit only explains their authenticity?

Mr. Wasserman: That is correct.

The Court: What you are really offering is the releases.

Mr. Wasserman: That is right. I take it there is no objection?

Mr. Raby: No objection.

(Marked Relator's Exhibit 2.)

Offering of Exhibits

Mr. Wasserman: If your Honor please, I understand that your Honor doesn't have in your file, in the file of this case, the transcript of testimony which was taken before Judge Clancy in this case.

The Court: I don't know whether it is or not. I didn't

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see anything that looked like a transcript of testimony as I went through the file.

Mr. Wasserman: I was so advised by the Clerk. It does contain some admissions made by the Government counsel, which the Supreme Court adverted to, and I think that should be before your Honor. I do have the complete transcript, which was filed with the Supreme Court, which includes the transcript of those statements. I assume that even though it may add to the record, in order that your Honor—

The Court: You are only offering part of it? You are not offering that whole thing? What is that you have in your hand?

Mr. Wasserman: This is the complete record, including transcript.

The Court: The complete record of what?

Mr. Wasserman: That went up to the Supreme Court. It includes the transcript, and I am primarily—

The Court: Doesn't it appear on certain pages? Why can't you have that book marked and offer only so much, or so many pages, as you wish to call to my attention?

Mr. Wasserman: I am offering page 8—

The Court: First have that book marked for identification.

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(Marked Relator's Exhibit 3 for identification.)

Offering of Exhibits

The Court: And then whatever pages you want in the record will be marked 3A in evidence.

Mr. Wasserman: Thank you, your Honor.

The Court: What pages are they that you offer?

Mr. Wasserman: I believe they are 8 to 16. It is just the argument.

(Marked Relator's Exhibit 3A.)

Mr. Wasserman: I offer in evidence the Washington Post article following Judge McGranery's press release, the Washington Post for Friday, October 3, 1952, which Mr. McGranery in his deposition stated accurately reflected his statement to the press.

Mr. Raby: No objection.

(Marked Relator's Exhibit 4.)

Mr. Wasserman: The Evening Star, October 3, 1952.

Mr. Raby: No objection.

The Court: What does that purport to be?

Mr. Wasserman: This is the Evening Star's version of this press conference.

The Court: Has that been identified?

Mr. Wasserman: It was identified by Judge McGranery.

(Marked Relator's Exhibit 5.)

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Mr. Wasserman: And the New York Times of the same date, October 3, 1952.

(Marked Relator's Exhibit 6.)

Offering of Exhibits

Mr. Wasserman: I have the original press releases of the Department of Justice dated December 8, 1952.

The Court: These are in addition to those already in evidence?

Mr. Wasserman: Yes, sir.

The Court: All right.

Mr. Wasserman: December 8, 1952, with reference to the case of Jack Dragna;

A press release dated December 8, 1952, with relation to the case of Hyman Pincus;

A press release dated May 19, 1953, with reference to the case of Anniello Ecole;

A press release dated May 8, 1953, with regard to the case of Gaetano Marterio;

I offer these in evidence.

The Court: Mr. Clerk, please mark them— Are you objecting to this?

Mr. Raby: Your Honor, I was just going to say this, that these press releases on their faces refer to individuals other than the relator. However, in view of the fact that they appear to reflect in general terms the existence of the

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program, I don't see that there is any real point in objecting to them, although the materiality is questionable.

The Court: We will take them.

(Marked Relator's Exhibits 7, 7A, 7B and 7C in evidence.)

Mr. Wasserman: I would like to read into the record a statement contained at page 2 of the annual report of the Immigration and Naturalization Service for the fiscal year ended June 30, 1953.

Offering of Exhibits

The Court: How long is it?

Mr. Wasserman: It is just one paragraph, one short paragraph.

The Court: Why don't you do this, why don't you offer it in evidence as an exhibit and have a copy made today and tomorrow and substitute it for that?

Mr. Wasserman: Just a copy of this paragraph?

The Court: A copy of that paragraph.

Mr. Wasserman: Yes.

The Court: Offer that in evidence. The book will be marked with an exhibit number and the paragraph will be marked with that number and a subletter. Then you substitute a copy of it because I will have that, then, with the rest of the exhibits and I won't have to be digging into the record to find out what you are calling my attention to.

The book will be marked 8 for identification and the paragraph—

Mr. Wasserman: It is the last paragraph on that page.

The Court: And the page, whatever it is, will be marked in evidence.

This is what report?

Mr. Wasserman: Annual report of the Commissioner of Immigration for the fiscal year ended June 30, 1953, and I am concerned with the last paragraph on page 2 of that report.

(Marked Relator's Exhibit 8A.)

Mr. Wasserman: I am prepared to call Mr. Finucane.

The Court: Suppose we just take a short recess.

(Recess)

Thomas G. Finucane—for Relator—Direct

THOMAS G. FINUCANE, called as a witness on behalf of the Relator, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wasserman:

Q. Mr. Finucane, what is your official title? A. I am chairman of the Board of Immigration Appeals for the Department of Justice.

Q. Were you chairman of the Board of Immigration Ap-

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peals when the Accardi case was before it? A. I was.

The Court: And when was that, please?

The Witness: It was before the Board—

Mr. Wasserman: On April 3rd—

The Witness: April 3rd was the date of the decision.

Mr. Wasserman: Was the date of the decision.

Q. And I think the file will show, Mr. Finucane, and you can correct me if I am wrong, that the case was certified to the Board sometime in 1952, I believe in July. A. August, I believe.

The Court: You were chairman at the time the case was heard and considered?

The Witness: I was.

Q. Have you had an opportunity to read through Mr. McGranery's oral deposition? A. I have.

Q. Do you agree with the statements therein contained?

The Court: Just a minute. That is not going to help me in the least bit. I haven't read it and it

doesn't mean anything. I took it you were going to have this witness testify about some facts.

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Mr. Wasserman: All right.

The Court: Why don't you have him testify to whatever facts you intend to elicit from the witness and then, if you wish, you may cross-examine him any way you wish, or further examine him on anything Mr. McGranery has said in his deposition?

Mr. Wasserman: I will follow your Honor's suggestion.

Q. Were you aware of the Attorney General's program as announced in the official press release of the Department of Justice on October 2, 1952? A. Yes, I was aware of that.

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Q. When did you—

The Court: When you say was he aware of it, do you mean—there came a time when the case of Accardi came before the Board?

The Witness: Yes.

The Court: At that time and prior thereto were you aware of some program of the Attorney General?

The Witness: I was.

The Court: Very well. Go ahead.

Q. When did you become aware of it? A. I became aware of it through the newspaper account—

The Court: No. When?

The Witness: When?

Q. Yes. A. I don't remember it, I believe it w... October—

Q. The program was announced on October 2, 1953. A. On October 2nd.

Q. 1952, I am sorry. A. On that date I became aware of it.

Q. How did you become aware of it? A. By reading the newspaper accounts. Later I received a copy of the Department press release.

Q. What newspaper accounts did you read? A. The Star and the Post, Washington Star and Washington Post.

Q. Did the Board of Immigration Appeals receive all the press releases issued by the Department of Justice? A. Yes.

Q. The official mimeographed press releases? A. Yes, we received all of them.

Q. The Board was on the mailing list, so to speak, to receive those press releases, is that correct? A. Yes.

Q. The press release would come to you as the chairman first, is that correct? A. That is right.

Q. You would generally read the press release and then circulate it among the other Board members? You would put your initial on the pink covering sheet, or is that correct? A. I would circulate some, but not all. Some of them had no relation to our work and they weren't circulated.

Q. But if they did concern your work, would the press release be circulated? A. That was the practice.

Q. Did you circulate the press release of October 2, 1952, announcing the Attorney General's program? A. I have no specific recollection of that. Probably was.

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Q. Did you circulate the other press releases which would relate to the Attorney General's program which subsequently were received by you as chairman of the Board? A. I would say that that would be the normal practice. I have no specific recollection.

Q. Do you have any specific recollection about the press release which related to Jack Dragna? A. No.

Q. Which was a case which was subsequently decided by the Board. Do you remember whether that was circulated? A. I don't remember specifically.

Q. You have to depend upon your general practice? A. That is right.

Q. And general recollection, is that correct?

(No answer.)

Q. Mr. McGranery has testified that his program was aimed at deporting and ridding the nation of undesirable aliens engaged in racketeering and other criminal activities. Was that your understanding of the program? A. My understanding of the program was that the part of the Department of Justice engaged in enforcement activities under the direction of the Attorney General, later Deputy Attorney General, selected and vigorously prosecuted cases

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considered from an administrative standpoint those which should be dealt with in that manner.

The Court: Should be dealt with in what manner?

The Witness: By vigorous prosecution.

Q. Can you answer whether or not the statement made by Mr. McGranery accurately reflects what the program was as far as you were concerned?

The Court: Hasn't he answered that?

Mr. Wasserman: No. I asked whether the program was aimed at deporting and ridding the nation of undesirable aliens engaged in racketeering and other criminal activities.

Mr. Raby: The witness has testified already, your Honor, as to his understanding.

The Court: He has testified what his understanding was.

Q. Did you have occasion to discuss the nature of the program with anyone in the Department of Justice or in the Immigration Service?

Mr. Raby: Will counsel fix a time for that?

Mr. Wasserman: Yes.

Q. (Continuing) During the period between April 3, 1953—during the period beginning November—during the

period beginning October 2, 1952, and the year following that.

The Court: The answer to that would be yes or no.

A. I had no occasion to discuss the program with anyone, any official or anyone in the Department of Justice, other than the Naturalization Service. The matter was discussed with Mr. Rawitz, who was the representative of the Immigration and Naturalization Service before the Board.

Q. When was it discussed with Mr. Rawitz? A. I

frankly couldn't give the exact date. It was probably around April, 1953.

Q. You had no occasion to discuss it with him before then? A. No.

Q. Is that correct? A. That is my best recollection on it.

Q. Do you know whether or not any other member of the Board of Immigration Appeals had occasion to discuss the program prior to April of 1953 with any member of the Immigration Service or anyone in the staff of the Immigration Service? A. Not that I know of. I said April 1952. That is approximately. It may have been earlier than that. It may have been a couple of months earlier.

Q. Can you refresh your recollection with reference to

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the announcement of the program—was announced in October 1952—how soon thereafter you had occasion to discuss the program with Mr. Rawitz or any member of the Immigration Service? A. I never discussed it with Mr. Rawitz or anyone else until Mr. Rawitz asked me as chairman whether the Board could expedite the consideration of cases in the program. To my definite recollection, that was sometime after the initial announcement of the program by former Attorney General McGranery.

Q. And about how long after, would you say, how many months after? A. Two or three months, I would say.

Q. Two or three months after October of 1952? A. Yes. Maybe longer.

Q. What was concluded as a result of that conversation? What did you say to Mr. Rawitz? A. I told Mr. Rawitz that we would expedite the consideration of all cases within the program.

Q. How did Mr. Rawitz advise you that a case was within the program? A. Mr. Rawitz stated that he would advise us of the individual cases within the program that were coming to the Board or were with the Board.

Q. Did he advise you—

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The Court: Do you mind if I ask a question before you go into that?

Mr. Wasserman: Not at all.

The Court: You say he asked you whether the Board could expedite cases that were within the program. Was there any discussion between you as to what was meant by expedite? In other words, was the expedition to consist of taking cases that were within the program ahead of cases that weren't on that program?

The Witness: Yes, your Honor. If I may explain a little background—

The Court: If you give me that answer first.

The Witness: Yes.

The Court: Were cases on the program to be put on what we would call in courts a preferred calendar?

The Witness: Yes.

The Court: They were to be given priority over other cases?

The Witness: That is correct.

The Court: That is what was the subject of discussion between you and Mr. Rawitz?

The Witness: That is correct.

The Court: Then as a result of that did you arrive at a method of accomplishing that?

The Witness: We did.

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The Court: How was that to be done?

The Witness: Mr. Rawitz was to give the names of all cases within the program to our calendar clerk, Mr. Warren Stoll.

The Court: Was that for the purpose of getting them on the calendar so that they would come along and be considered as quickly as the Board's business would permit?

The Witness: That is correct.

Q. Were these communications from Mr. Rawitz, that a case was on the Attorney General's list or program, communications in writing or oral communications, or both? I mean, how was it accomplished mechanically? A. Mechanically, most of them were in little written memoranda which were delivered to Warren Stoll.

The Court: Warren Stoll was your calendar clerk?

The Witness: That is correct.

Q. Let us stop there a moment. Do you recall just what the written memorandum used to say? A. It would be something to the effect that this case is within the program and, without more elaboration, that was sufficient. We had agreed on the procedure.

Q. Let me refresh your recollection of it and ask you

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whether this was not a typical communication from Mr. Rawitz—I don't mind telling you I am reading the communication which was introduced in evidence in the Matranga case. First, it was a memorandum from Mr. Rawitz

to you, and it was marked "Confidential" on the top, and "Confidential" on the bottom, and then it would read, "I have just been informed that the above-named alien has been placed on the Attorney General's list."

The Matranga memorandum continues to read, "Your records show that this case was assigned to Mr. Bradshaw on April 7, 1953."

Was that a typical memorandum which might have been sent in a case? A. That is right.

Q. Nothing was said generally in the memorandum about expediting the case; it was just a reference that it was within the Attorney General's program or on the Attorney General's list, which I understand the Government contends is the rough way of referring to the program. A. Yes.

Q. Is that correct? A. Yes.

Q. Do you recall in how many cases you would have only received oral communications? A. No, I can not state

how many cases we would receive oral communications.

Q. But you did receive some oral communications? A. We may have.

Q. Do you know whether or not such a communication was submitted to you, either orally or in writing in this Accardi case? A. Definitely there was no request in writing. I have no recollection of receiving an oral request. I have interrogated the members of the Board and others who would normally receive such request. No one has a recollection of receiving such a request.

Q. How can you tell that there was no written request? A. I ascertained that by inquiring from Mr. Rawitz who keeps a carbon copy of all memorandums sent to the Board.

Thomas G. Finucane—for Relator—Direct

Q. That kind of memorandum is kept in the confidential files of the Service, is that correct?

(No answer.)

Q. It would not be in the file that the Board of Immigration Appeals would have before it or make it available to counsel, is that correct? A. It would not be made available to counsel, that is correct.

Q. And if you received such a communication you would

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not advise counsel that you had received such a communication? A. No.

Q. Whether it was received orally or in writing. A. Yes.

Q. Did you ever have occasion to discuss the program with Mr. Mackey or Mr. Devaney or anyone else in the Immigration Service? A. I did not.

Q. Did you or did you not understand the program to be a drive to expel racketeers and other undesirables? A. No, I didn't understand that, the program to be a drive to expel racketeers and other undesirables.

Q. Did you or did you not understand the program to be one for intensifying efforts looking towards deportation and denaturalization of subversives and racketeers? A. I understood the program to be one to intensify efforts in the prosecution of such cases.

The Court: By that do you mean to speedily arrive at a final determination?

The Witness: At a final determination, that is right.

Q. Did you or did you not ever discuss the program with Mr. Donegan in the Department of Justice? A. No.

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Q. Did Mr. Donegan ever have occasion to call the Board with regard to the program? A. No.

Q. Did Mr. Horan ever have occasion to call the Board?

The Court: You say did he have occasion. This man wouldn't know whether he had occasion.

Q. Did he? Did Mr. Horan ever call you with regard to the program? A. He did not.

The Court: Do you know whether or not he ever called any other member of the Board?

The Witness: To my knowledge, he did not.

The Court: Do you know whether or not he called your Clerk, your Calendar Clerk, or any other clerk connected with the Board?

The Witness: Not so far as I am aware.

The Court: So far as you know, did any message purporting to come from Mr. Donegan or Mr. Horan —is it?

Mr. Wasserman: Yes, sir.

The Court: (Continuing) —come to your attention at any time?

The Witness: No.

Q. The press release of April 3, 1953, in this case states that "Mr. Accardi was ordered deported under the current"—and I am quoting—"current denaturalization and deportation program of Attorney General Brownell against

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racketeers and subversives." Was that a correct account of what occurred in this case?

Thomas G. Finucane—for Relator—Direct

Mr. Raby: I object on the ground that this witness is not qualified to judge the accuracy of the press release which describes the event after the Board had acted.

Mr. Wasserman: This is the same day.

The Court: Read the question.

(Question read.)

The Court: I sustain the objection to it. You may reframe your question.

Q. Did you have—

The Court: There came a time, did there, when the case of Accardi came before your Board?

The Witness: Yes.

The Court: And was there a hearing held?

The Witness: There was.

The Court: Was the alien represented by counsel?

The Witness: He was.

The Court: Was testimony taken or was it merely argument on the record already made?

The Witness: Merely argument on the record already made.

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The Court: Were these submitted to your Board, do you recall?

The Witness: I don't recall.

The Court: Was there a record made of the argument?

The Witness: There was.

The Court: Was it afterwards taken into consideration?

Thomas G. Finucane—for Relator—Direct

The Witness: It was, your Honor.

The Court: Were there conferences between you and what other members of the Board sat at a panel to hear the appeal?

The Witness: There was.

The Court: Was the conduct there in conformity with the usual practice of your Board in arriving at decisions?

The Witness: Yes.

The Court: At any time during the conference in which this matter was to be considered was any order or direction or press release of the Attorney General before you?

The Witness: No, your Honor.

The Court: Was there any discussion among you or any other members of the Board of the import or effect of any press release or direction by the Attor-

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ney General?

The Witness: No, your Honor, there was not.

The Court: Was the decision you arrived at a free and undictated decision of each member of the Board?

The Witness: It was, your Honor.

The Court: Was there unanimity among you or was there some dissent?

The Witness: There was no dissent.

Q. When was the Accardi case argued before you? A. It was argued in November. November 20th—

Q. 26th, 1952? A. 1952.

Q. And it was decided April 3, 1953? A. That is right.

Thomas G. Finucane—for Relator—Direct

Q. The same day the Attorney General's office through its press department issued the press release, is that correct? A. That is correct.

Q. Do you know in what manner that particular division secured the information to issue that press release?

Mr. Raby: The witness's knowledge of the manner in which that information was acquired?

The Court: He can answer whether he knows it or not.

Mr. Raby: All right.

The Court: Did you, or, as far as you know, any

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member of your Board have anything to do with the preparation of the press release?

The Witness: We had nothing to do with the preparation of the press release.

The Court: Just a minute. Did any member of your staff, as far as you know, have anything to do with the preparation of the release?

The Witness: No member of the staff had anything to do with the preparation of the release.

The Court: That is all I am asking now. At the time your decision was announced was that decision communicated to the Department of Justice?

The Witness: I have no recollection as to this case. We have had requests from the Public Relations Division, the division that prepared press releases, in certain cases to let them know of our decision, and, as a matter of routine, we send a copy of the decision to the Public Relations Department when we make the decision.

Thomas G. Finucane—for Relator—Direct

I would judge, from the fact that there was a press release dated the same day as the decision, that that did happen in this case.

The Court: That a copy of your decision was communicated?

The Witness: That is right.

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The Court: Any time and prior to your own promulgation of the decision, at any time prior to that did you advise the Public Relations Division of the Department of Justice, or the Attorney General, as to what the decision would be?

The Witness: No, your Honor.

The Court: Was any announcement made to anybody until the decision was known?

The Witness: No, your Honor, there was not.

Q. You did not have a communication from the press department with reference to the Accardi case prior to the rendition of your decision, is that right? A. I said I assume we must have had a request to let the Public Relations Division know our decision.

Q. And that would have been prior to April 3, 1953? A. Probably, yes.

Q. Wasn't it customary—

The Court: Pardon me Do you recall whether there was any specific request for the decision in the Accardi case, or was there a general request that in all of these cases on the program the Public Relations office be advised.

The Witness: No, I have no specific recollection

as to the Accardi case at all. We had no request to send all cases of any category over.

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Q. Is it not the practice for the press division to request that you advise them of your decision in every case on the Attorney General's program? Is that not the general practice? A. I am not aware of it, that we have such a request, as a broad proposition, no. I don't want to be misleading. As I understand it, we get requests of cases by name.

Q. That is correct. A. Of course, I personally didn't handle this, and I may have the mechanics of it not too accurate, but my understanding is we receive requests from the Public Relations Division to let them know about cases by names, and we do.

Q. Is it not the general practice for them to select names from the Attorney General's program? A. I think that is accurate.

Q. So that there was a communication by the press division to the Board by name, most likely, with regard to Joseph Accardi prior to the Board's decision? A. That is probably right.

Q. The Board had the Accardi decision before it from July or August of 1952 until April 3 of 1953, is that correct? A. Yes.

Q. So that there was no occasion to expedite the Accardi case, is that correct? A. Excuse me?

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Q. You didn't, in fact, expedite— A. We didn't, in fact, expedite it.

Q. —the Accardi case? A. That is right.

Q. The Accardi case presented no complicated question of law, as far as you were concerned? A. That is right.

Q. It did not present any complicated question of fact, did it? A. No.

Q. How long does it normally take you to decide a routine case before the Board of Immigration Appeals? A. I would say at the time the Accardi case was decided that we would be about the normal routine time.

Q. You don't know whether or not the other members read the various news items which you read in the Washington Star—or the Washington Post or the Evening Star with regard to the Attorney General's program, do you? A. No.

Q. Can you state definitely whether or not the impression of the program was that it was a program to expedite rather than to deport?

The Court: Realize what is being asked, what the impression of the other members of the Board was.

Q. I want to know whether you are in a position— A. Of course, I could only say from—

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The Court: Could you say at all?

The Witness: I couldn't say, no. I couldn't say.

Q. You were aware that Accardi had been granted favorable relief by way of pre-examination in 1945, is that right? A. Yes.

Q. Can you state what it was that made the Board rule in favor of deportation in his case in 1953? A. I could only state what the opinion of the Board states. I think that can speak for itself.

Q. You cannot state anything beyond that? A. That is correct.

Thomas G. Finucane—for Relator—Direct

Q. Can you state why voluntary departure of the alien was not granted to him? A. Not from—

Mr. Raby: I object to that on the ground that—
The Court: Sustained.

Q. The Board is a creature of the Attorney General, is that correct? A. That is right.
Q. It was created by the Attorney General by regulations—

The Court: That is a matter that you don't need testimony from a witness on. That is a matter of law that you can ask the Court to take notice of.
Mr. Wasserman: All right. I do.

Q. In the return here and in the affidavit in support of that return it is stated that "The Board has granted

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favorable relief to aliens who have been within the Attorney General's list or program."
Can you state a single case in which the Board has granted suspension in any case within the program? A. I will have to preface that by saying we keep no permanent records of cases within the program. When the case comes to us with the request that it be expedited, and we expedite it, the case goes out. We have no record of cases within the program. But I can add this, that having been aware that you had made this inquiry, I have checked with the Immigration Service and asked them to give me a list of the cases where we had rendered a final decision that was within the program, and on that list there is no case where we have granted suspension of deportation.

Q. Is there any case where you have granted pre-examination? A. No.

Q. So in every case where a final decision has been rendered, in a case within the program, you have either ordered the individual to leave the country voluntarily or you have ordered deportation, is that correct? A. That is right.

Q. In no case have you entered an order which would facilitate permanent residence of the individual in the

United States, so far as you know? A. Well, as to that there were several cases, four, I believe, where we directed a reopening.

Q. I am talking about final orders. A. You said an order to facilitate.

Q. A reopening does not necessarily indicate what your final decision would be? A. No. It has a tendency to facilitate.

Q. Can you state—

The Court: Do you mean when cases came before you—there were four such cases—

The Witness: Yes, four.

The Court: —where, when they came before you, you directed that they be sent back and be reopened in order to permit the taking of testimony looking towards the facilitation of permanent residence?

The Witness: That is right.

Q. In those four cases had you made up your mind that permanent residence should be accorded to those individuals? A. Of course, we didn't make up our minds until the final hearing.—

Q. So you cannot say that you were reopening it with a view towards letting them remain here permanently?

The Court: Wouldn't it be a very odd procedure

for a reviewing party to prejudge a case when they were sending it back to get evidence?

Mr. Wasserman: I am merely trying to bring out the sole purpose was to get additional evidence.

The Witness: That is correct.

Q. Is that correct? A. Yes.

Q. Did you have any information before you indicating that Joseph Accardi was a racketeer? A. No.

Q. In reaching your decision—

The Court: If you are going to try to examine the chairman of the Board as to his mental operation—

Mr. Wasserman: No, I am not. I am concerned with whether or not anything—

The Court: You are concerned with the issue here, as I understood you to pose it yourself this morning. The only issue before this Court is whether or not there was a direction, either direct direction or an indirect direction, from the Attorney General to the members of this Board as to how they should conduct their affairs and as to what decisions they should arrive at in certain cases.

Q. A motion was made in the Accardi case for reconsideration, is that correct? A. A motion was made for a stay of deportation.

Q. And that motion was directed to the Board, is that

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correct? A. Yes.

Q. And at the time the Board had that motion before it—

The Court: Pardon me just a minute. Let me find out when that was. Was that subsequent to April 3rd?

The Witness: Yes, sir.

Mr. Wasserman: Yes, it was May 11, 1953.

The Witness: Yes.

The Court: May 11th? That is a couple of weeks after your decision.

The Witness: That is right.

Q. At that time the Board was aware of the Attorney General's press release with regard to Joseph Accardi, which was dated the same day as the Board's decision, is that correct? A. Yes.

Q. So that at that time you were aware of the fact that the Attorney General's office considered Joseph Accardi to be a racketeer, is that correct? A. Yes.

Q. To your knowledge had the press release of April 3, 1953, been circulated among the other Board members? A. I cannot say positively that it had. It probably had.

Q. Did Warren Stoll maintain a list of cases which

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were within the Attorney General's program, to your knowledge? A. He maintained for his own information a list of cases furnished by the Service representative which had not been received by the Board, and enabling him to prop-

erly identify them when received. And he kept that list while the case was with the Board.

Q. Was it customary to advise the individual who prepared the decision that the case was within the Attorney General's program? A. It was customary to direct expeditious consideration or expeditious action of the case.

Q. Are you aware of who the Board members were who decided this case, the Accardi case? A. The case was argued before a panel consisting, I believe, of Mr. Ludwig and Mr. Montaquila. It was discussed later in conference by the full board.

Q. All five members voted on this particular case? A. That is right.

Q. Was that a usual practice? A. It is a practice where there is any issue which we feel should be discussed by the full board or any case which any member would like to discuss with the full board.

Q. Do you recall why it was that this particular case

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was discussed by all five board members?

The Court: Would you let me suggest reframing it?

Mr. Wasserman: Certainly.

The Court: Was what was the issue in this case—first of all, who decides whether or not it will be considered by two members or full board? Who makes that decision, or who did make that decision in this case, if you recall?

The Witness: Any board member may request consideration of the case by the full board.

Thomas G. Finucane—for Relator—Cross

The Court: Do you know who did that in this case?

The Witness: I do not recall, your Honor.

The Court: There did come a time when, at somebody's request, it was considered by the full board?

The Witness: Yes.

The Court: What was the issue?

The Witness: The issue was the question of the discretionary relief.

Q. Why was it felt that that particular issue should be discussed by the full board, do you recall? A. I don't.

Q. You don't recall? A. I do not recall, no.

Mr. Wasserman: I have no further questions.

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Cross Examination by Mr. Raby:

Q. While our minds are on the subject, Mr. Finucane, I would like to direct your attention to the application for stay of deportation which was made to your Board on Mr. Accardi's behalf in the month of May, 1953. Did the Board in fact have jurisdiction to entertain such application for stay of deportation?

Mr. Wasserman: I object to the question.

The Court: Overruled.

Mr. Raby: You may answer.

A. The Board did not have jurisdiction to consider that issue.

Q. And it was, in fact, denied on that ground? A. It was denied on that basis.

Mr. Raby: May I have the record file marked for identification as Respondent's Exhibit A?

(Marked Respondent's Exhibit A for identification.)

Q. Now, sir, you are the chairman of the Board of Immigration Appeals, which is an administrative appellate body, is that correct? A. That is correct.

Q. You review administrative records wherein there has been a decision by the Commissioner of Immigration, is that correct? A. The Commissioner or his subordinates.

hearing officers, special inquiry officers, and so on.

Q. The Accardi case itself was decided, was it not, on the basis of an administrative record which was presented to the Board; would you say that was correct? A. That is correct.

Q. I show you Respondent's Exhibit A for identification and ask you whether or not this is the record upon which the Board acted? A. It is my recollection that this is the record upon which we acted.

Q. I would like you to look through the record very carefully and tell us whether or not there is anything that you decided the case on that was not in the record which you have before you.

Mr. Wasserman: May we first find out whether or not this witness can recall whether this is the complete file that was before him? I mean, he is handed a document that is probably two or three inches thick.

The Court: Yes; all right.

Mr. Raby: Yes, I understand.

The Witness: The question was—

The Court: The first question is, is that the record that was before your Board and upon which

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you were passing?

The Witness: My recollection is that that would seem to be the record we had. Of course, I cannot remember in detail that every document in the file was there when we had it, or that some document there when we had it has been removed. I couldn't say that, but from my examination of it it appears to be the record that we considered at the time we made our decision.

Mr. Raby: I offer Respondent's Exhibit A for identification in evidence.

Q. Now, sir, my next question is this—

The Court: Any objection to that?

Mr. Wasserman: No.

(Respondent's Exhibit A for identification received in evidence.)

Q. (Continuing)—did any facts or factors not of record figure in any way in your decision in this case? A. No.

Q. Did you at any time receive any instructions or requests from the Attorney General of the United States or any of his subordinates as to how the case should be decided on the merits? A. We did not.

Q. As a matter of fact, sir, when this case was argued

before you in the fall of 1952 were you aware of the fact

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that Mr. Accardi was on the Attorney General's so-called program? A. I was not aware that he was on the program. I have no recollection of ever receiving any communication, written or oral, that Accardi was on the program.

Q. As a matter of fact, sir, can you tell us when you first found out for the first time as to the date when Mr. Accardi's name was added to the program? A. I found that out last Friday or Monday, when I made inquiry for the specific purpose.

Redirect Examination by Mr. Wasserman:

Q. Mr. Finucane, it is the practice, is it not, for the Board of Immigration Appeals to consider a matter outside the record in relation to discretionary relief? A. Yes.

Q. How can you be sure at this time that back in April of 1953 you did not consider material outside the record in this case? A. Because it is the practice of the Board, when confidential matter is considered on the discretionary relief issue, to so state specifically in its opinion.

Q. Is that an invariable practice? A. It is a practice which, under instructions from the Board, is followed in

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all cases. Whether there should, in any individual case, be a slip, of course it is beyond me to say.

Q. Is it not the practice, of course, of the Board to indicate in an opinion whether or not a case is on the Attorney General's list, is it? A. No.

Q. So that to that extent if you had received confidential

information that an individual was on the list, you would not indicate it in your opinion? A. No.

Q. Aside from this invariable practice you have no way of telling whether or not you considered matter outside the record in this particular case? A. That is correct, over and above the fact I have no recollection of any matter outside the record.

Q. How can you tell whether or not you were aware on April 3, 1953, whether or not Joseph Accardi was on the list? A. Excuse me?

Q. How can you now tell whether or not you were aware back in 19—April 3, 1953, whether or not Joseph Accardi was on the Attorney General's list? A. By the fact that no communication to the Board so stating can be located.

Q. No written communication? A. No written communication. No members of the Board, and I interrogated all

members of the Board on this, have any recollection of the fact that Accardi was on the list when that decision was made.

Q. So it is purely a matter of memory if the communication was orally directed to the Board? A. That is true.

Q. You said you made inquiry as to whether or not Accardi was on the list recently, some two weeks ago. Of whom did you make inquiry? A. I asked Mr. Montiglio to find out for me when Mr. Accardi's name was placed on the list.

Q. Have you any idea just what process he went through to attempt to find that out? A. I understood he called up Mr. Horan.

Q. How would Mr. Horan know about this?

The Court: Oh, please. You are asking him how Mr. Horan would know.

Mr. Wasserman: If he knows.

The Court: Oh, please. Now, don't take up our time that way.

Q. In other words, no inquiry was made directly by you of anyone in the Immigration Service? A. That is correct.

Q. I just want the record to show: Who is Mr. Horan? A. He is an attorney in the office of the Deputy Attorney

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General.

Mr. Raby: May I ask one or two more questions?

Recross Examination by Mr. Raby:

Q. Now, sir, as I understood your testimony on direct, there came a time, did there not, when somebody from the Department of Justice would occasionally communicate with the Board of Immigration Appeals relative to a special calendar preference of program cases, is that correct? A. That is, communications came via Mr. Rawitz.

Q. Yes, and can you tell us approximately when that practice really got started? A. I have a difficult time to be too accurate. Things like that grow up. But it is my recollection, to the best of my recollection, that it may have been last December, or it may have been a little later than that.

Q. As I understand your testimony, the purpose, as you understood, of those communications, was to expedite a determination of the case. A. That is right.

Q. Is that correct? A. That is right.

Thomas G. Finucane—for Relator—Recross

Q. Assuming that such a communication had been received relative to Accardi, would the decision have been

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reached—would it have taken approximately five or six months, as it did, to reach the decision which was finally reached in the case?

Mr. Wasserman: I object to that question.
The Court: Overruled.

A. No, it would not.

Q. Now, sir, you spoke of Mr. Horan. Mr. Horan, you stated, is in the office of the Deputy Attorney General? A. That is right.

Q. Let me ask you this, Mr. Finucane: When the Board of Immigration Appeals decides a case favorable to an alien, under your regulations can that decision be overruled by the Attorney General? A. It can.

Q. If he is not satisfied with it? A. It can.

Q. Let me ask you this question: When you have decided, that is to say, when your Board has decided a case and the case is certified for further review in the Attorney General's office, to what branch of the Attorney General's office does that case go? A. The case would go to the executive assistant to the Attorney General, Mr. Charles Metzner.

Q. Is Mr. Metzner in any way connected with Mr. Horan's office or the office of the Deputy Attorney General? A.

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No.

Q. To your knowledge has Mr. Metzner ever communicated with the Board of Immigration Appeals relative to

a case under advisement by the Board, suggesting that the case should be decided one way or another? A. He has not.

Mr. Raby: That is all.

By Mr. Wasserman:

Q. When did you say, Mr. Finucane, it became the practice to notify the Board about cases on the Attorney General's list? A. I have said that it is vague in my mind exactly when. It may have been December or January or February. It possibly could have been—

Q. Of what year? A. Of 1950—

Q. The program was commenced in 1952? A. No, it wasn't. It must have been in the spring of 1953, I would guess. It is vague in my mind.

The Court: Spring of 1953 that the practice of informing the Board of these cases—

The Witness: That is right. I might—

Q. Let me just refresh your recollection. I have before me the communication in the Metrango case. That is dated April 21, 1953. Does that refresh your recollection, at least

in April 1953 it already was the practice, was it not, to notify the Board? A. Yes, it certainly was in April of 1953, yes.

Q. Do you have any recollection as to how far before April of 1953 it became the practice?

The Court: That has been gone into so often and the witness has answered it so frequently he cannot

fix it with definiteness, that I am not going to spend any more time on it. He said it was sometime in the spring. It would be either early spring—it must have been before that date in April to which you draw his attention, but how soon before that he doesn't know.

Mr. Wasserman: I thought that perhaps this date would help him fix the approximate time a little more definitely.

The Court: He says it doesn't, and constant repetion isn't going to help us at all, certainly, when it was in effect in April and the Accardi case did not come before the Board until August.

Mr. Wasserman: No, the Accardi case was before the Board in this particular month.

The Court: I see the point you want to argue. You have established that.

Mr. Wasserman: I just want to bring that out, that in that same month, when it was decided, it was the

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practice.

The Court: Very well.

Mr. Wasserman: I have no further questions.

(Witness excused.)

* * * * *

Mr. Wasserman: I have no further testimony to present at this time, your Honor.

I do, however, make the request that the depositions of the other Board members be taken and a deposition be taken of Mr. Horan.

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The Court: How many depositions will that be, four members of the Board?

Mr. Wasserman: Four members of the Board.

The Court: And Mr. Horan.

Mr. Wasserman: And Mr. Horan.

The Court: That would be five. I should think you would be able to take them all. The deposition is going to relate to a narrow issue—

Mr. Wasserman: Very narrow.

The Court: —as to notice or communication by Mr. Horan.

Mr. Wasserman: And their understanding of the program. As a matter of fact, I am primarily concerned with these two issues, their understanding of the program and notice about the Accardi case.

The Court: It would seem to me you ought to be able to do that in a day.

Mr. Wasserman: Oh, yes, no question.

Relator's Exhibit 1

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil 85-78

UNITED STATES OF AMERICA, *ex rel.* JOSEPH ACCARDI,

Relator,

—v.—

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service, New York District, Department of Justice,

Respondent.

Washington, D. C.
Monday, June 21, 1954

Deposition of JAMES P. MCGRANERY, a witness of lawful age, taken on behalf of the Relator in the above-entitled action, pursuant to stipulation of the parties, before Charles E. Barnes, a Notary Public in and for the District of Columbia, at the office of James P. McGranery, Barr Bldg., Washington, D. C., at 3:09 p.m., Monday, June 21, 1954.

APPEARANCES:

On behalf of Joseph Accardi,
JACK WASSERMAN, Esquire;

On behalf of Respondent,
CHARLES MCNELIS, Esquire and
MAURICE A. ROBERTS, Esquire
Attorneys, Department of Justice

Relator's Exhibit 1

Thereupon, JAMES P. MCGRANERY, a witness of lawful age, was duly sworn by the Notary Public and, being examined by counsel, testified as follows:

Direct Examination by Mr. Wasserman:

Q. Were you the Attorney General of the United States on October 2, 1952? A. Yes.

Q. Did you hold a press conference in your office in Washington, D. C. on that date? A. I did.

Q. Does the official press release of the Department of Justice contain the announcement which you made on that date? A. A copy of the release is here, and it does.

Q. Do the news items of October 3, 1952 in the Washington Star, The Washington Post and the New York Times, accurately reflect your statements to the press? A. They do.

Q. Did you or your staff prepare and maintain a list of aliens included within your program to denaturalize and deport racketeers and subversives? A. The answer to that is yes and no. We were constantly combing the list for aliens against whom, in my judgment, there should be proceedings started to strip them of their naturalization in some cases and move for deportation or both.

Q. Were there approximately one hundred names on this list? A. There was no static list. The list was constantly changing from day to day.

Q. Did you maintain a list which was constantly changing? A. No.

Q. Did you have a little book and keep the names in the book? A. No; no. I got a report from day to day.

I will explain that a little later if you want me to.

Q. All right.

Relator's Exhibit 1

Was this list prepared before or after your announcement of October 2, 1952? If after, please state approximately when. A. The combing of the records of these undesirables began as early as June of 1952.

Mr. Wasserman: Off the record.

(Off the record.)

Mr. Wasserman: On the record.

The Witness: I had in mind while I was sitting on the bench that political organizations, particularly in the large metropolitan areas, were in some cases dominated by racketeers, and certainly the racketeers were active in these metropolitan political organizations.

By Mr. Wasserman:

Q. When Jack Ignatius Dragna was arrested for deportation on December 8, 1952, the official press release of that day by the Department of Justice said:

"The arrest, Mr. McGranery said, was another step in his denaturalization and deportation program deemed at ridding the nation of undesirable aliens engaged in racketeering and other criminal activities."

A. You can underline that "undesirable aliens".

Q. Did the aforesaid quotation accurately reflect your program? A. That is right. That reflects accurately my program.

Q. Was your program aimed at deporting and ridding the nation of undesirable aliens engaged in racketeering

and other criminal activities? A. That is repeating the previous question and, with the emphasis on undesirable aliens engaged in racketeering and other criminal activities, that was my program.

Q. At the time of your press conference, according to the newspaper accounts, you had included within your program such persons as Frank Costello, Nicholas Circella, William Lias, Hyman Shomberg, Alfred Polizzi, Harry Voiler and Anthony Volpe. The Government had admitted that Joseph Accardi was within your program. Do you recall whether he was included before or after your announcement of October 2, 1952? A. Joseph Accardi's case was one of the earliest cases submitted, and his case was already on appeal at the time.

I think now- if I am incorrect, you correct me—Joseph Accardi's case had been heard by the Hearing Commissioner before and prior to October 2, 1952.

Q. That is correct. A. But my investigation and the record of Accardi proved him, to my satisfaction, to be a racketeer. That is why I put him on there.

Q. When you say "on there", do you mean in this moving list? A. Yes, although he was not on the list as you have described to me. Accardi's case had already been set for a hearing before even my press conference of October 2, 1952. The Hearing Commissioner had found against Accardi. Accardi's case was on appeal, if my recollection is correct, at that time.

Mr. McNelis: Yes.

Mr. Wasserman: That is correct.

Mr. McNelis: Off the record.

(Off the record.)

Relator's Exhibit 1

Mr. Wasserman: On the record.

The Witness: Accardi's petition for relief was pending before the Appeals Board on October 2, 1952.

Mr. Roberts: Off the record.

(Off the record.)

Mr. Wasserman: Back on the record.

The Witness: To sort of get the idea over to you exactly as to what motivated me and how this program was handled in the Department is reflected truly by the statement or release, the press release, of that day, but to recapitulate here and to clarify what I had in mind, as I have already stated, I was of the opinion that undesirable persons engaged in racketeering were dominating, in some cases, the political parties in metropolitan areas.

With this in mind, I had a conference very early in my administration with John Edgar Hoover. I asked him to prepare for me, after combing his records, names of persons who were engaged in subversive activities and subject to deportation, names of persons engaged in subversive activities who were citizens of the United States, and then to investigate the manner in which their citizenship was obtained; next, racketeers and undesirables who were here in the country and subject to deportation, racketeers and undesirables who had obtained their citizenship through fraud.

I had a second meeting with Mr. Hoover where he submitted evidence to me that would justify the Department of Justice giving its particular attention

and to set up a small group that would process these particular individuals and their records.

In order to coordinate the activities of the Department, another meeting was held at which were present Mr. J. Edgar Hoover; the Deputy Attorney General, Mr. Ross Malone; the Commissioner of Immigration, Argyle Mackey; the head of the Criminal Division, Mr. Charles B. Murray, and it was then suggested that Mr. Thomas J. Donegan be charged with the responsibility of coordinating the investigation and the preparation of charges in those cases indicating deportation proceedings and that they be promptly begun; and in those cases indicating the cancellation of citizenship, looking toward deportation, that that likewise be initiated without undue delay.

By Mr. Wasserman:

Q. May the record show who Mr. Donegan was, what his official capacity was?

Mr. McNelis: Yes.

The Witness: Mr. Donegan is a lawyer and a member of the New York Bar.

Mr. McNelis: I am quite sure he is a member of the New York Bar.

By Mr. Wasserman:

Q. Did he have any official capacity in the Government? A. Yes; Special Assistant Attorney General of the United States, designated by me.

Relator's Exhibit 1

He is a man of long experience in the Department, having served in the Department of Justice during my tenure as the Assistant to the Attorney General.

Mr. McNelis. Off the record.

(Off the record.)

Mr. Wasserman: On the record.

By Mr. Wasserman:

Q. Did Mr. Donegan or did you keep any record which would indicate who the individuals were who were to be included with the program? A. I might add there, each morning a progress report was submitted to me of the activities of the previous day. That is the only report we kept. Progress reports were submitted to me from day to day.

Q. Covering the specific individuals? A. Covering all of the individuals that we were inquiring into.

Q. Here is what I had in mind: When you issued your press release, you named about six or seven individuals. A. Yes.

Q. So obviously, you had some names before you— A. That is right. There were some ready to go, and those we named. Those who were ready to go, I named that day.

Mr. McNelis: I believe that press release also indicated, Mr. Wasserman, the current action taken with respect to those particular individuals.

Circella was one that comes to mind. Was he not picked up a few days before?

Relator's Exhibit 1

Mr. Wasserman: That is not the press release. That is the newspaper item. Circella's name is not mentioned in the press release.

The Witness: No. I gave them that, I think, afterwards.

Mr. McNelis: The two in the press release were Costello, I believe, and Charley—

Mr. Wasserman: Six or seven names.

The Witness: I said Circella came here from the West Indies, British West Indies, in 1929, accompanied by Capone.

Polizzi, I said, has a police record dating back to 1920, is a native of Sicily and was naturalized in Cleveland in 1928.

By Mr. Wasserman:

Q. Attorney General Brownell has stated in press releases that Joseph Accardi is a racketeer. Do you recall whether he was included within your program because you or your staff considered him to be a racketeer? A. He was one of the first.

Q. And this was on the basis of an FBI report to you? A. What is that?

Q. Your conclusion that he was a racketeer was on the basis of an FBI report which you received, or other material which you received? A. That is right. It is on the basis of the investigation I made at that time.

My investigation of Accardi indicated that he was a racketeer and that is the reason I moved to deport him.

Q. Do you know how the information that an individual was included within your program was communicated to

the Board of Immigration Appeals? A. There was no information communicated to the Immigration Board of Appeals until we prepared the cases, and as the cases were prepared, they were submitted in the regular order.

I never at any time discussed this matter with any member of the Immigration Board of Appeals.

As you will recall, even in the Rubenstein case, after the Immigration of Appeals, I personally gave at Schofield another opportunity to be heard.

Q. Yes; I recall that. I am well aware of it. A. Yes. I gave him another opportunity to be heard.

Frankly, I can't get your point. I don't see what you are driving at. The Immigration Board of Appeals is the Attorney General.

Mr. Wasserman: Off the record.

(Off the record.)

Mr. McNelis: On the record.

Cross Examination by Mr. McNelis:

Q. I would like to ask you, sir: Did you ever submit to the Board of Immigration Appeals an over-all, comprehensive list of the individuals that were on this particular Attorney General's denaturalization and deportation program? A. The Board of Appeals only received the material that was furnished to them in the individual cases. They never received a list.

Q. They never received a list? A. Never.

Q. Did you at any time ever indicate to the Board of Immigration Appeals, either directly or indirectly, your feelings as to how they should determine a case pending

before them? A. No; I never bothered with the Board of Appeals. I think you know that.

Mr. Wasserman: Yes.

By Mr. McNelis:

Q. To your knowledge, did anyone in the Department of Justice ever indicate to the Board of Immigration Appeals, directly or indirectly, what we might think your feelings were with respect to their determination in the particular case? A. No; no, I don't think so.

Q. I think we can agree that the Board of Immigration Appeals were asked to expedite cases. A. I brought Donegan into the Department and brought Hoover and Argyle Mackey, the Deputy Attorney General, and Murray together, so there would be complete understanding that this program of mine was in no way to be held up. It had the green light in the Department. There wasn't any question about it. I made that clear.

Redirect Examination by Mr. Wasserman:

Q. Do you know whether or not there was a practice to advise the Board of Immigration Appeals—and I don't mean from you, directly, but by other members of the Department, or the Immigration Service—as each case came before it, that that particular case was within the Attorney General's program? A. Will you repeat that, Mr. Wasserman?

Q. Do you know whether or not someone within the Department—and by that I include the Immigration Service as well as the Department of Justice—would tell the Board of Immigration Appeals, "This case you now have before you, Nicholas Circella, is a case within the Attorney Gen-

eral's program?" A. I don't know about that. I wouldn't know about that, but I should imagine that they would probably say to them, "Here is one of the cases that we want expedited."

Mr. Wasserman: Off the record.

(Off the record.)

Mr. McNelis: I would say, on the record, it has been the practice of the Immigration Service—and I think, Mr. Roberts, you can add to this, and feel perfectly free to do so—to expedite certain types of cases long before the program was established, and the program cases were, when presented to the Board of Immigration Appeals, asked to be expedited along with the other policy cases which were always expedited before the Immigration Appeals.

Subversive cases were always expedited, were they not, Mr. Roberts?

Mr. Roberts: That is right.

Off the record.

(Off the record.)

Mr. Wasserman: On the record.

Do you have any further questions?

Mr. McNelis: No.

Mr. Wasserman: I have no further questions.

Shall we waive signature?

Mr. McNelis: Yes.

Mr. Wasserman: All right; we will waive signature.

(Thereupon, at 3:38 p.m., the taking of the deposition was concluded.)

Relator's Exhibit 1

UNITED STATES OF AMERICA
DISTRICT OF COLUMBIA

I, Charles E. Barnes, a Notary Public duly commissioned and qualified in and for the District of Columbia of the United States, aforesaid, do hereby certify that, pursuant to stipulation of the parties, there came before me the 21st day of June, 1954, at 3:09 p.m., in the office of James P. McGrannery, Barr Building, Washington, D. C., the following-named person, to-wit, James P. McGranery, who was by me duly sworn to testify the truth, the whole truth, and nothing but the truth of his knowledge, touching and concerning the matters in controversy in this action, and that he was thereupon carefully examined, upon his oath, and his examination reduced to writing under my supervision and that the deposition is a true record of the testimony given by said witness.

I further certify that I am neither attorney nor counsel for, nor related to, or employed by any of the parties to the action in which this deposition is taken, and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in the action.

In witness whereof, I have hereunto set my hand and affixed my notarial seal this 22nd day of June, 1954.

(Seal)

(Signed) CHARLES E. BARNES
Notary Public in and for the
District of Columbia

My Commission expires
May 14, 1959.

Relator's Exhibit 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil 85-78

UNITED STATES OF AMERICA, *ex rel.*
JOSEPH ACCARDI

Relator

—against—

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service, New York District, Department of Justice

AFFIDAVIT

DISTRICT OF COLUMBIA,
CITY OF WASHINGTON, *ss.*:

JACK WASSERMAN, being duly sworn, deposes and says:

I am attorney for the relator herein and I represented him in this matter before the Supreme Court of the United States.

Attached hereto is a copy of a letter addressed to the Clerk of the United States Supreme Court by the acting Solicitor General, dated January 28, 1954, and copies of the Department of Justice Press Releases releases referred to therein.

(Signed) JACK WASSERMAN
Jack Wasserman

Sworn to and subscribed :
before me this 27th day :
of April, 1954 :
(Seal)
(Signed) ANNA A. HAMMOND
Notary Public
Anna A. Hammond
Notary Public, D. C.
My Commission Expires May 14, 1958

Relator's Exhibit 2

January 28, 1954

Honorable Harold B. Willey
Clerk, United States Supreme Court
Washington, D. C.

Re: No. 366 U. S. *ex rel.* Joseph Accardi v.
Edward J. Shaughnessy, Dist. Dir. I. N. S.

Dear Mr. Willey:

We are transmitting under separate cover the briefs for the respondent in the above-entitled case. Enclosed are the following materials in this case:

1. Ten copies each of the Department of Justice press releases referred to at pages 20-21 of the petitioner's brief.

2. Ten copies of petitioner's motion to the Board of Immigration Appeals, after the Board's decision, for a stay of deportation and reopening of his case. This motion is referred to in the petition for habeas corpus paragraphs 17 and 18, Record page 3.

3. Ten copies of the Board's decision of May 8, 1953 on the foregoing motion.

We would appreciate your distributing to the Justices copies of the foregoing materials along with the briefs.

Sincerely yours,

Robert L. Stern
Acting Solicitor General

Enclosures

Relator's Exhibit 2

FOR RELEASE ON DELIVERY
October 2, 1952

DEPARTMENT OF JUSTICE

Attorney General James P. McGranery today made the following statement:

I am happy to see you again and to have the opportunity to discuss with you the program of the Department.

My main purpose in inviting you today is to explain to you a program which has been formulated to answer a departmental need which I have recognized for some years. You already have glimpsed part of our purpose—but our ultimate goal has never been clearly stated.

Our final goal—which we approach with vigorous determination is to restore the dignity of citizenship and to realize the promise of a full life in accordance with American ideals for those who come to us from foreign lands.

In order to achieve this postive end it is necessary to thwart the criminal activities as pursued by those ungrateful recipients of American hospitality—the naturalized racketeers—who insult the Flag and the Nation by flagrant disrespect and disobedience to the laws of the land which has given them refuge and freedom. Hence there will be a series of individual petitions to the District Courts to revoke naturalization. We will pursue a similar course with respect to Communists who have reached their status as citizens through naturalization.

In addition, appropriate action for deportation will be taken against the unsavory characters who have continued to be aliens technically as well as in the broader sense. We will do our job with thoroughness so that we can be certain

that every bit of evidence necessary to successful prosecution will be properly presented.

I may digress here to say that—it is and has been my earnest and considered opinion—the execution of this plan will do much to destroy the roots of organized crime in America.

There will, of course, be no relaxation in our continuing program of deporting Communist aliens.

We already have told you that we are moving for the denaturalization of Frank Costello. You also have been told of our order that Charles Chaplin be held for hearing when he seeks to reenter this country. He will be required to show, as does every alien seeking original entry, that he is admissible under our immigration laws.

This should be a salutory lesson for the youth of our land who are striving to determine for themselves what it means to be a citizen. It will give a new meaning to citizenship in that those who seek it, owe it to the nation to live good lives and contribute to its welfare.

FOR IMMEDIATE RELEASE
FRIDAY, APRIL 3, 1953

DEPARTMENT OF JUSTICE

Attorney General Herbert Brownell, Jr., announced today that the Board of Immigration Appeals has sustained the order of the Immigration and Naturalization Service to deport Joseph Accardi, 43, of Newark, New Jersey. The order charges that he entered the United States at Buffalo,

Relator's Exhibit 2

New York, August 19, 1932, without the required immigration visa.

Accardi, known as a New Jersey racketeer, is a native of Sicily, Italy, and brother of Samuel Accardi against whom denaturalization proceedings are pending in the Federal court at Newark.

The Attorney General also announced that the Immigration and Naturalization Service has ordered deported Hyman Pincus, 58, of Miami, Florida, and New York City. The order is based on grounds that on re-entering the country after a trip to Bimini, West Indies, he falsely stated that he was a citizen of the United States. Born in Austria, he arrived in the United States at New York on January 7, 1900. He is a nationally known racketeer and was a henchman and bodyguard of the notorious Waxey Gordon. He has entered an appeal from the deportation order.

Anthony Pino, 45, Quincy, Massachusetts, has been ordered deported by the Immigration and Naturalization Service, on charges that he has been convicted more than once for crimes involving moral turpitude, namely rape, assault with intent to commit rape, and larceny. He was born at Divieto, Italy, May 9, 1907. Pino was among those questioned in connection with the Brinks robbery in Boston.

These actions were taken under the current denaturalization and deportation program of Attorney General Brownell against top racketeers and subversives. They are the result of closely coordinated action and intensive investigation by the Federal Bureau of Investigation and the Immigration and Naturalization Service.

Relator's Exhibit 2

FOR IMMEDIATE RELEASE
Monday, April 20, 1953

DEPARTMENT OF JUSTICE

Attorney General Herbert Brownell, Jr., announced today that Joseph Accardi, 43, Newark, N. J., racketeer, has been picked up by the Immigration and Naturalization Service for deportation Friday.

Arrangements have been completed for him to sail on the S. S. Homeland from New York. Pending the sailing Friday, he is being held in the Federal Detention House in New York City.

The Immigration Appeals Board earlier this month dismissed his appeal from an order for his deportation to his native Italy.

Accardi is a brother of Samuel Accardi against whom denaturalization proceedings are pending in the U. S. District Court at Newark.

Relator's Exhibit 2

FOR IMMEDIATE RELEASE
MONDAY, MAY 11, 1953

DEPARTMENT OF JUSTICE

The Board of Immigration Appeals today made public a decision dismissing the motion of Joseph Accardi, 43, Newark, New Jersey racketeer, for reopening of his deportation case.

The Board, in a decision April 3, dismissed his appeal from the outstanding deportation order against him. He has been ordered deported on grounds that he entered this country without the required immigration visa.

In his motion, Accardi contended that he had no opportunity to settle his affairs, and that because of the urgency thereof, he desired a stay of deportation for six months in order to dispose of his farm, livestock, other property and to settle his business affairs in this country.

The Board said that the question of stay of deportation was one for the Immigration and Naturalization Service to decide, and not one for it to determine.

Accardi was born in Sicily, October 4, 1909, and entered this country through Buffalo, New York, August 19, 1932.

Relator's Exhibit 2

FOR RELEASE TO MORNING PAPERS OF
Wednesday, May 20, 1953

ADDRESS

BY

HONORABLE HERBERT BROWNELL, JR.

ATTORNEY GENERAL OF THE UNITED STATES

Prepared for Delivery

at

Stark County Division

Ohio Republican Finance Committee

Dinner

Hotel Onesto

Canton, Ohio

Tuesday, May 19, 1953

Relator's Exhibit 2

There is now pending before Congress legislation which would, if approved, bring into being a major project designed to strengthen the economic and military power of the United States and Canada. I speak of the St. Lawrence Seaway and Power Project which now has the full endorsement of the President and his entire Cabinet.

There has been discussion and planning of such a project for more than a hundred years, but it was not until President McKinley was in the White House that the first major step toward the seaway was taken. It was in 1899 that he sent to Congress the report and recommendations of the Deep Waterways Board. This report called for the creation of a deep water route from the Great Lakes along the St. Lawrence to the Atlantic Ocean. In the years that followed, there were some major waterway improvements, but the big project itself remained a matter of discussion within the United States and between the United States and Canada.

Throughout 1922, there was widespread discussion which finally led President Harding to send to Congress a report. In a strongly favorable message, he said that the "feasibility of the project is unquestioned and its cost, compared with some other great engineering works, would be small." The cost, even in the present day, would be small compared to the great benefit which would accrue to the United States as well as to Canada. It would greatly bolster the economic progress of not only the Midwest but also the great industrial Northeast. It means iron ore for the furnaces of Ohio, Pennsylvania and Indiana; and cheap electric energy for the power short factories and mills of the northeast.

• • • • •

Relator's Exhibit 2

However simple such a description may be—the Department of Justice is in fact an intricate maze of subdivisions and bureaus.

Here is an organization of 30,000 employees dispersed in 11 buildings in Washington and in 500 additional offices throughout the United States and its territories. To carry out the tasks assigned to us we handle over 30 million pieces of mail a year; our 4,781 motor vehicles travel more than 53 million miles; we take in 275 million dollars in revenue and spend 175 million dollars.

Coming from private practice to an organization like this was a somewhat unsettling experience. I felt much like the man who fell out of a fourth story window onto the sidewalk. Quickly a crowd gathered and a policeman pushing his way through to the injured man asked, "What's going on here?" The fellow replied, *"I dunno, I just got here myself."*

Well, that was *almost* my reaction. For the size and diversity of the Justice Department has no remote counterpart in private practice of law. Here in the Department we're hard put to keep any kind of touch with our 1,600 lawyers, personal or otherwise—to say nothing of the other 50 classifications of employees who make up the 30,000 persons on the staff of the Department.

What do they all do—these lawyers and investigators, librarians, clerks and prison guards?

I'll be able to answer that question more definitively after I've earned my first hash mark in the job. But here are a few examples of the thousands of decisions and actions the Department of Justice may be called to make and take in a single day: to apprehend a pair of spies in Vienna and bring them back to the United States for question-

ing . . . to replace a prosecutor stricken with appendicitis midway in a trial against Communist leaders in Honolulu . . . to adjudicate claims brought about by a Navy plane ramming a commercial airliner in mid-air . . . to institute condemnation proceedings against property in Colorado, needed for a new military airfield . . . to request a Grand Jury presentment in Florida where KKK terrorisms and bombings endanger civil liberties . . . to seek an injunction against a striking labor union in a tiny parts manufacturing plant in Dunkirk, New York, whose product was vital to the atomic energy program . . . to initiate deportation proceedings against undesirables like Joseph Accardi . . . to testify before a Senate or House Committee on some pending bill, such as, perhaps, justifying our Departmental budget of $175,000,000 . . . to write an opinion for the President on a proposed Executive Order . . . to select a new Board of Directors for a $100,000,000 corporation whose stock is owned by the United States and administered in the Office of Alien Property . . . to recommend to the President a new Federal judge or action on a clemency petition.

* * * * *

Relator's Exhibit 2

ORGANIZED CRIME
ITS THREAT TO BUSINESS AND GOVERNMENT

ADDRESS

BY

WARREN OLNEY III

ASSISTANT ATTORNEY GENERAL OF THE UNITED STATES

Prepared for Delivery

Before

The Chicago Crime Commission

The Congress Hotel

Chicago, Illinois

Friday, October 30, 1953

12:15 p. m.

Relator's Exhibit 2

I have been asked to speak today on organized crime—its threat to business and government—and to discuss in this connection the responsibility of the citizen in the control of organized crime.

All of us know that organized crime has become a problem. During the past 30 years, syndicates and gangs of criminals have emerged in many parts of the country and, in some instances, have successfully extended their activities over whole states and even across the nation. The influence of the criminal syndicates has left ugly, anti-democratic stains on the political fabric of our country. The elimination of the racketeer and the destruction of crime as an organized business has become the main problem in the administration of criminal justice in the United States today.

The general aspects of organized crime have become more clearly delineated as the result of recent investigations and reports made by crime commissions, Congressional Committees, and other agencies, both official and unofficial. The underlying motives, the methods and techniques of the business of crime have become better known. The insidious relationships with government and politics have become plainer. As a result, a very wide public has come to sense the terrifying proportions of the interlocking crime and corruption rings in this country, and the public concern is profound. All of us may well ask ourselves, where lies the responsibility for the existence of these conditions? To whom shall we look for their correction?

A good many of us who have no personal responsibility for law enforcement and occupy no public office seem to think we have a ready answer to at least the first of these questions. • • •

• • • • •

Relator's Exhibit 2

In my opinion, the responsibility of the Department of Justice is for more effective action in the three established areas where the Federal Government has primary jurisdiction.

First, we have the duty to keep the channels of interstate commerce free of the criminal commodities and activities upon which local hoodlums depend.

The second area is one in which the Department of Justice has not only primary but exclusive jurisdiction—the field of denaturalizing and deporting gangsters and racketeers, who are foreign-born and who, because of their criminal activities, can make no claim to remain in the United States while violating its laws. The overwhelming majority of foreign-born residents are loyal and law-abiding citizens, but there is no place here for that small percentage of foreign-born who make use of their citizenship to engage in crime. We have investigated and are continuing to investigate criminals with naturalized citizenship. This program has proven to be very successful and we are daily able to issue warrants for denaturalization and deportation because investigations have disclosed that those engaged in illegal activities as a profession have not hesitated to obtain citizenship or entry into this country by fraud or to commit crimes of moral turpitude.

To name but a few of the nationally known hoodlums who are the objects of the program—Spinella from Florida and DeSimone from Missouri have been deported—Nicolo Impostato of Kansas City, Jack Dragna of Los Angeles, Joe Accardi of New York and Joe Adonis of New York have all been ordered deported—proceedings for the cancellation of citizenship have been instituted against Albert Anastasia, Joe Bonnano, Pietro Corrado, Vito Genovese, and Frank Costello.

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Relator's Exhibit 4

(See Opposite)☞

Relator's Exhibit 7

FOR IMMEDIATE RELEASE
MONDAY, DECEMBER 8, 1952

DEPARTMENT OF JUSTICE

Attorney General James P. McGranery announced today that Jack Ignatius Dragna has been arrested for deportation by Immigration and Naturalization Service officers at his home in Los Angeles, California.

The arrest, Mr. McGranery said, was another step in his denaturalization and deportation program aimed at ridding the Nation of undesirable aliens engaged in racketeering and other criminal activities.

Dragna was born April 18, 1891 in Corleone, Palermo, Italy. He entered the United States first in 1898 and in 1909 returned to Italy with his parents. He was re-admitted for permanent residence March 14, 1913.

The arrest for deportation was issued on the basis of a charge that Dragna did not possess required documents when he re-entered the United States July 24, 1932, after a trip out of the country.

Relator's Exhibit 7A

For Immediate Release:
THURSDAY, DECEMBER 18, 1952

DEPARTMENT OF JUSTICE

Attorney General James P. McGranery announced today that a complaint charging *Hyman Pincus* of New York and Miami, Florida with false claim to United States citizenship has been filed with a U. S. Commissioner at Miami, Florida. The complaint was filed by the Immigration and Naturalization Service.

Pincus was arrested in New York December 3, 1952 for deportation by Immigration and Naturalization Service officers. *The arrest was in connection with the denaturalization and deportation drive instituted by Mr. McGranery against undesirable aliens engaged in racketeering and other criminal activities.*

The complaint filed in Miami charges that he falsely claimed citizenship October 7, 1950 when returning through Miami after a visit to Bimini, B. W. I. The penalty provided for in the statute under which the complaint was filed is $1,000 fine, three years' imprisonment, or both.

The deportation arrest was made on the basis he not only falsely claimed citizenship but had no valid immigration visa or document in lieu thereof when he arrived in Miami October 7, 1950 by boat. He claimed then to have been naturalized in 1910. He never has been.

Pincus, born in Austria, December 20, 1894 originally entered this country at New York, January 7, 1900. He allegedly was a henchman and bodyguard of the late "Waxey" Gordon who was a New York racketeer.

EXHIBIT
U. S. Dist. Co.
S. D. of N. Y.
JUN 23 195.
#4

U.S. Plans to Deport 100 Alien Racketeers

By Murrey Marder
Post Reporter

Attorney General James P. McGranery announced yesterday that the Justice Department hopes to strip citizenship rights from 100 foreign-born racketeers and deport them.

At the same time he said the department is speeding up similar moves aimed at foreign-born Communists.

"I'm trying to emphasize the great dignity there is in citizenship," said McGranery.

The crackdowns on underworld figures and subversives who are naturalized citizens require proof that fraud was involved in their naturalization. If that is proved, they will then become targets for deportation action, along with certain non-citizens.

The organized drive at foreign-born racketeers is a far larger program than has been previously indicated.

McGranery named seven underworld figures now in custody for the denaturalization-deportation campaign.

One of them, Nicholas D. Circella, whom McGranery described as a former accomplice of Al Capone, was picked up just yesterday in Chicago, he said.

The others include such figures as Frank Costello, New York gambling "czar," and William G. (Big Bill) Lias, who was recently apprehended in Wheeling, W. Va., and also Hyman Stromberg of Philadelphia, Alfred P. Polizzi of Cleveland, Harry Voiler of Miami and Anthony Volpe of Chicago.

The cases to be presented against these men date back to incidents of 10, 20 or 30 years ago.

Asked why action was just now being instituted, McGranery replied he can only be accountable for procedure during his own short tenure in office. Besides, he noted, it takes time to "find some basis for fraud," and also, "some of these men have controlled political machines."

When a reporter asked if he did not believe it likely that the drive could leave him open to "a Republican charge of 'politics,'" McGranery replied:

"Don't you think that everything and anything lays you open to a charge? Isn't it obvious that this very thorough and painstaking plan couldn't be accomplished in two or three weeks?"

McGranery said he has had the antiracketeering drive in mind for two or three years.

"I believe if you want to destroy a thing," he said, "you must pull it out by the roots."

Newsmen questioned McGranery at length about his previously announced plan to hold up the reentry to this country of British-born movie actor Charlie Chaplin, who is now in England.

McGranery vigorously recited "charges" which he said have been made against Chaplin, and said, "I have directed that he be examined and interrogated and qualify as though on an original entry."

"Mr. Chaplin has been here for some 40-odd years," he said. "Mr. Chaplin has enjoyed the hospitality and all the opportunities of this country," he said, although Chaplin is not a citizen.

"They have charged Mr. Chaplin, Number 1, . . . with being a member of the Communist Party," said McGranery.

"Who has charged him?" one reporter asked.

"Well, you read the papers," answered McGranery.

"He has also been charged," said McGranery, "with grave moral charges. He has also been charged with making statements which indicate a leering, sneering attitude toward a country whose gracious hospitality has enriched him."

"No harm can come from a fair hearing," said the Attorney General.

McGranery said he has been thinking about the Chaplin case since he read of his "sneering responses" in connection with "his invitation to attend a show for the benefit of some children's thing out there on the West Coast."

The Attorney General said he was concerned about "men so highly publicized" who "show such an utter contemptible regard for the high estate of womanhood."

"If what has been said is true," said McGranery, "he is in my judgment an unsavory character."

McGranery said he cannot publicly discuss his anti-Communist program of denaturalization and deportation in any detail, but noted that "We deported 31 alien Communists this year."

In listing the underworld targets, McGranery indirectly took note of fears expressed by Sen. John J. Williams (R-Del.) that Frank Costello might be deported before he could be used to testify against other racketeers.

McGranery gave assurance that none of those involved would be deported until each has "paid his debt to society." Costello is now serving an 18-month term for contempt of Congress.

Costello, a native of Italy, is a naturalized citizen. Lias, 400-pound retired gambler and now owner of the Wheeling Downs racetrack, claims he is a citizen, but the department lists him as a native of Greece.

Circella is the target of deportation action and McGranery said he came here from the British West Indies in 1929, accompanied by Capone. Polizzi, who has a police record dating back to 1920, is a native of Sicily and was naturalized in Cleveland in 1928.

Volpe, a native of Argentina, naturalized in Chicago in 1920, is "alleged to have been the personal bodyguard and the executioner for the late Al Capone," said McGranery. Voiler, a Romanian, has a record dating back to 1918, he said.

Barnard College Editors Vote 5-1 For Stevenson

NEW YORK, Oct. 2 (AP).—The editorial board members of the Barnard Bulletin, undergraduate publication of Barnard College, the women's college at Columbia University, came out 5-to-1 today for Gov. Adlai E. Stevenson over Dwight D. Eisenhower.

The paper published two editorials—one representing the viewpoint of the five board members in favor of the Democratic presidential candidate and the other written by the member in favor of the Republican candidate.

Yesterday the Columbia Spectator, undergraduate newspaper, came out editorially for Stevenson. The last time the Bulletin supported a presidential candidate was in 1932 when it came out for Norman Thomas, the Socialist candidate.

Eisenhower is on leave as president of Columbia.

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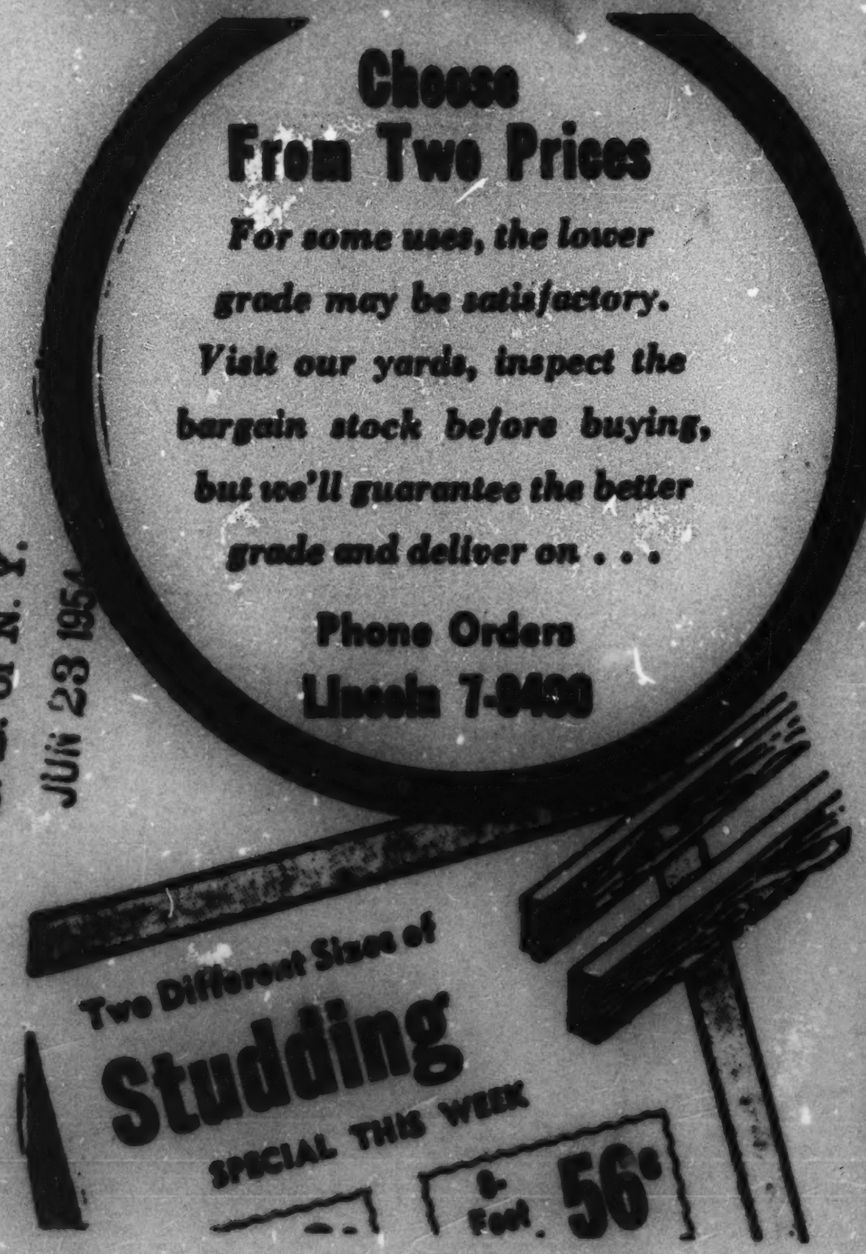

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EXHIBIT
U. S. Dist. Court
S. D. of N. Y.
JUN 23 1954

McGranery Disavows Political Motives in A

The Justice Department's drive to rid the country of some 100 naturalized citizens and aliens with underworld or other unsavory reputations is no sudden face-saving device for the Democratic administration, according to Attorney General McGranery.

He announced late yesterday that six such foreign-born persons, several of whom apparently never became citizens, already have been picked up. Denaturalization or deportation proceedings will be started at once.

These do not include Communists, naturalized or alien. But the overall drive, Mr. McGranery explained, will apply to Communists who might legally be subject to denaturalization or deportation for certain offenses or fraudulent statements.

Nor, at this stage, does it include Charles Chaplin, the actor who is to be questioned by immigration authorities when he returns from a trip to his native England, the Attorney General added.

Exception to Protest.

"But if what has been said about Mr. Chaplin is true," he declared, "he is, in my judgment, an unsavory character. It has been publicly charged that he was a member of the Communist Party, and with grave moral charges, and with making statements that would indicate a leering, sneering attitude toward a country whose hospitality has enriched him. No harm can come from a fair hearing."

Mr. McGranery took exception to Mr. Chaplin's recent protest that the Government broke faith with him. Mr. Chaplin said he was granted a re-entry permit and then learned in mid-ocean that, on his return, he would be required to show, as does every alien seeking original entry, that he is admissible under this country's immigration laws.

The Attorney General said a re-entry permit is primarily an identification document and not an agreement that a person can or will be admitted to the United States.

Reporters asked Mr. McGranery whether there was any connection between the current election campaign and the Justice Department's "sudden" moves against such varied personages as Communists, Charles Chaplin or underworld naturalized citizens or unsavory aliens.

Political Aims Denied

The Attorney General declared there was no political purpose. It was obvious, he said, that the investigations, arrests and overall program are the result of many months of planning and work.

He remarked also that, long before he became Attorney General, he advocated such moves.

"Our final goal," he said, "is to restore the dignity of citizenship and to realize the promise of a full life in accordance with American ideals for those who come to us from foreign lands.

"In order to achieve this positive end, it is necessary to thwart the criminal activities as by ungrateful recipients of can hospitality—the na racketeers—who insult and the Nation by disre disobedience to the law land.

"Hence there will be a individual petitions to th courts to revoke natur We will pursue a simil with respect to Commun have reached their statu sens through naturaliz addition, appropriate a deportation will be take the unsavory characters continued to be aliens t as well as in the broade

Six Picked Up in W

The Justice Departme ously announced it will denaturalization of Frank New York racketeer no an 18-month prison sen

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Political Motives in Moves to Deport 100 Naturalized Citizens, Aliens

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Aims Denied

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...necessary to thwart the criminal activities as pursued by ungrateful recipients of American hospitality—the naturalized racketeers—who insult the flag and the Nation by disrespect and disobedience to the laws of the land.

"Hence there will be a series of individual petitions to the Federal courts to revoke naturalization. We will pursue a similar course with respect to Communists who have reached their status as citizens through naturalization. In addition, appropriate action for deportation will be taken against the unsavory characters who have continued to be aliens technically as well as in the broader sense."

Six Picked Up in Week.

The Justice Department previously announced it will move for denaturalization of Frank Costello, New York racketeer now serving an 18-month prison sentence for contempt in refusing to answer questions of the Senate Crime Investigating Committee.

Mr. McGranery yesterday said the following six other persons have been picked up within the past week:

Nicholas D. Circella of Chicago, who, according to the Attorney General, came to this country by plane with the late Al Capone in 1929 and has since built up a long criminal record.

Hyman C. Stremberg of Philadelphia, a Russian native, naturalized in 1945 and described as a big-time bookmaker and numbers operator.

Alfred Polizzi of Miami, described as a gambler and former bootlegger, who came here from Italy and was naturalized in 1933.

Anthony Volpe of Chicago, recently a bookie and once the personal bodyguard of Al Capone, Mr. McGranery said. Volpe was naturalized in 1930.

Harry G. Veller of Miami, who Mr. McGranery said is not a citizen but has a criminal record dating back to 1918 in this country.

William G. Liss of West Virginia, millionaire race track owner and former boxing czar, who disputes Justice Department contention that he was not born in the United States.

Costs Cause Murder

After a series of rows with his landlady over his two cats, a retired civil servant at The Hague, Holland, strangled the landlady, hanged the cats and gassed himself.

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The New York Times.

LATE CITY EDITION
Cloudy, then clearing and cooler today. Fair tomorrow.
Temperature Range Today—Max., 62; Min., 50
Temperature Yesterday—Max., 77; Min., 54
Full U. S. Weather Bureau Report, Page 47

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EXHIBIT
U. S. Dist. Court
S. D. of N. Y.
JUN 23 1954

M'GRANERY STAR A DRIVE TO DEP ALIEN RACKETE

Campaign Includes Mov Denaturalize Those Who Taken Out Citizensh

100 GANGSTERS INVO

Attorney General Says H Will Continue to Rid of Foreign-Born Re

By LEWIS WOOD
Special to The New York Times.

WASHINGTON, Oct. 2— P. McGranery, Attorney G announced today a drive United States citizenshi naturalized racketeers and nals, then eject them fr country.

He told a news conferen steps already had been against a half dozen und aliens, and that the progra continue against "close to ures in the underworld a ganized crime." Mr. Mc predicted that his plan wo store the dignity of citize and "do much to destroy th of organized crime in Ame

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Mr. McGranery denied tha were any political implicat announcing his campaign time when Republicans we sailing the Administration leged laxity in proceeding subversive persons. He sa the study under which he proceed had been going weeks, and that he had con it long before taking his office last May.

McGranery Attacks Cha

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"He has been publicly c with being a member of th munist party, and with moral charges, and with statements that would ind leering, sneering attitude to country whose hospitality riched him."

The Attorney General ag that he would start denatu tion proceedings against Costello, the gambler, who serving an eighteen-month sentence for contempt of Co The Justice Department h cused Costello of conceali criminal record when he ot United States citizenship i Mr. McGranery said that th bler would have to "discha

Continued on Page 8, Colu

M'GRANERY STARTS A DRIVE TO DEPORT ALIEN RACKETEERS

Campaign Includes Moves to Denaturalize Those Who Have Taken Out Citizenship

100 GANGSTERS INVOLVED

Attorney General Says He Also Will Continue to Rid U. S. of Foreign-Born Reds

By LEWIS WOOD
Special to The New York Times.

WASHINGTON, Oct. 2—James P. McGranery, Attorney General, announced today a drive to take United States citizenship from naturalized racketeers and criminals, then eject them from this country.

He told a news conference that steps already had been taken against a half dozen undesirable aliens, and that the program would continue against "close to 100 figures in the underworld and organized crime." Mr. McGranery predicted that his plan would "restore the dignity of citizenship" and "do much to destroy the roots of organized crime in America."

He also promised to rid the country of naturalized Communists. And there will be no relaxation in the program of deporting Communist aliens, the Attorney General asserted. Thirty-one persons have been deported so far in 1952, he added.

Mr. McGranery denied that there were any political implications in announcing his campaign at a time when Republicans were assailing the Administration for alleged laxity in proceeding against subversive persons. He said that the study under which he would proceed had been going on for weeks, and that he had considered it long before taking his Cabinet office last May.

McGranery Attacks Chaplin

Mr. McGranery spoke critically of Charlie Chaplin, the British-born film actor, whom Immigration authorities will question closely before he will be readmitted to this country. If assertions about Mr. Chaplin are true, "he is in my judgment an unsavory character," the Attorney General said, adding:

"He has been publicly charged with being a member of the Communist party, and with grave moral charges, and with making statements that would indicate a leering, sneering attitude toward a country whose hospitality has enriched him."

The Attorney General again said that he would start denaturalization proceedings against Frank Costello, the gambler, who is now serving an eighteen-month prison sentence for contempt of Congress. The Justice Department has accused Costello of concealing his criminal record when he obtained United States citizenship in 1925. Mr. McGranery said that the gambler would have to "discharge in

Continued on Page 9, Column 2

McGranery Opens Drive to Deport 100 Alien Figures in Underworld

Continued From Page 1

full his obligation to this country" before deportation proceedings would begin.

As an example of the persons he seeks to deport, Mr. McGranery cited Nicholas D. Circella, who was arrested in Chicago today on a deportation warrant.

The Attorney General said that Circella, who had a long criminal record, last entered this country in 1939, accompanied by Al Capone, the gangster, and that at the time Circella wrongly claimed United States citizenship.

Other Proceedings Started

Denaturalization proceedings also have been started against the following three men, Mr. McGranery said:

Hyman Chaim Stromberg, arrested at Miami. A native Russian, who was naturalized in New York in 1943, Stromberg was reported to have "controlled the numbers, bookmaking and other gambling activities in Philadelphia for more than ten years."

Alfred P. Polizzi, arrested at Miami. A native Sicilian, who was naturalized in Cleveland in 1928. Polizzi was said to have been a prohibition era bootlegger and later a gambling operator at Cleveland and Newport, Ky. His police record dates back to 1920.

Anthony Volpe, taken into custody at Miami. It is alleged that he was a bodyguard and "executioner" for Al Capone. In recent years he was said to have been conducting extensive bookmaking operations in Chicago.

Deportation proceedings were announced against the following:

Harry Chiles Voiter, a native of Rumania, arrested at Miami. His police record goes back to 1918. He served a robbery sentence in the Michigan State Penitentiary, officials said.

William Linn, Wheeling (W. Va.) race-track man and gambling figure, who has been fighting the Government over alleged income-tax evasion.

Mr. McGranery made plain that in attempting to denaturalize the accused persons, some basis for fraud in making their citizenship applications must be discovered. He implied that the Justice Department and Immigration officials had been carefully combing the records to avoid mistakes.

Discussing the Chaplin case, the Attorney General said that the actor had been in the United States forty-one years, "enjoying the hospitality and all the opportunities of this country," without becoming a citizen. He added that he had reasons for directing that the actor "be questioned on his original entry" when he returned to the United States.

Breaking Faith Is Denied

"His lawyer said we broke faith concerning his re-entry permit, but such a permit is merely identification," Mr. McGranery asserted. He stressed that a re-entry permit did not necessarily assure automatic new admission to this country.

"No harm can come from a fair hearing for Chaplin," he said. "If he can meet the standards, he will be admitted."

Long before entering the Cabinet, Mr. McGranery added, he had heard criticisms of Mr. Chaplin. One instance he cited concerned an invitation "for a children's affair on the West Coast."

Mr. Chaplin, the Attorney General declared, was said to have spoken "with contemptible regard for the high estate of womanhood," and "if what has been said is true, he is an unsavory character."

Bomb Found in Tokyo Embassy

TOKYO, Oct. 2 (AP)—A small, home-made fire or stench bomb was found inside the United States Embassy compound this morning. But an embassy official said it was "certainly not" explosive or lethal.

Relator's Exhibit 7B

FOR IMMEDIATE RELEASE
Tuesday, May 19, 1953

DEPARTMENT OF JUSTICE

Attorney General Herbert Brownell, Jr. today directed the filing of a petition seeking cancellation of the naturalization of Anniello Ercole, Brooklyn, New York, on grounds that he failed to make full disclosure of his criminal record during naturalization proceedings.

The petition will be filed soon in the U. S. District Court at Brooklyn.

It was another step in the *program calling for denaturalization and deportation of racketeers and others in the criminal element who were born outside the United States.*

Ercole was born July 17, 1896 in Naples, Italy, and came to this country December 2, 1903. He was naturalized in the U. S. District Court in New York City, February 1, 1945.

During the naturalization proceedings, the Attorney General said, Ercole testified under oath that he had been arrested and charged with violations of law on several occasions but that his last arrest was in 1930 and that it was on a charge of possessing firearms. The petition will charge that he failed to disclose that he was arrested September 25, 1943 on a charge of "pool-selling, bookmaking, bets and wagers" in violation of New York State laws and that on February 21, 1944, he was convicted on this charge and fined $100.

The Attorney General said that at the final hearing on his naturalization petition, February 1, 1945, the court reviewed the police record but Ercole did not reveal any of the facts relating to the 1943 arrest or the 1944 conviction.

Relator's Exhibit 7C

FOR IMMEDIATE RELEASE
FRIDAY, MAY 8, 1953

DEPARTMENT OF JUSTICE

Attorney General Herbert Brownell, Jr. announced today that a petition seeking cancellation of the naturalization of Gaetano Martino, Brooklyn, New York, has been filed in the U. S. District Court in Brooklyn.

The move was another step in the *program for denaturalization* and/or *deportation of racketeers and others who have engaged in criminal activities.*

Martino, born September 28, 1900, at Palermo, Italy, came to this country November 16, 1916, applied for naturalization December 22, 1927, in the United States District Court in New York City and was naturalized August 30, 1928.

During proceedings leading to the naturalization, he admitted being arrested in 1924 on a charge of transporting liquor and being fined $10.00 and also being fined $2.00 for speeding three years prior to the filing of his petition. He said that he had no other arrests.

However, recent investigation showed that he was arrested by New York City police January 17, 1928, for possession of a gun and robbery to which he pleaded guilty. He subsequently was sentenced to the penitentiary on the robbery charge and received a suspended sentence on the gun charge.

Mr. Brownell said that this arrest occurred during the naturalization proceedings and was not disclosed by Martino.

Relator's Exhibit 7C

The denaturalization petition will be based on grounds that he was not a person of good moral character at the time he sought naturalization and that the court was without authority to admit him to citizenship because the Act under which the grant was made had already expired. His petition was filed under a temporary law permitting World War I veterans to obtain citizenship without meeting requirements set for other aliens who were not veterans.

Relator's Exhibit 8A

EXCERPT from page 2, Annual Report of the Immigration and Naturalization Service, for the fiscal year ending June 30, 1953.

It was a fortuitous combination of circumstances that brought together an investigative force growing in size and efficiency, a sharpened law, and the *Attorney General's special program for intensifying efforts looking toward the deportation and denaturalization of subversives, criminals, racketeers, narcotics law violators, and others who have demonstrated that their presence is inimical to the United States.* By the close of the fiscal year, denaturalization suits had been instituted against 17 naturalized citizens considered leading racketeers in the United States, and deportations had been instituted in 23 top racketeer cases.

Respondent's Exhibit A

—152—

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

May 15, 1952

File: A- 4 373 872

In re: JOSEPH ACCARDI

IN DEPORTATION PROCEEDINGS

IN BEHALF OF RESPONDENT: Herbert C. Smith, Esquire
1122 South Orange Avenue
Newark, New Jersey

CHARGES:

Warrant: Act of 1924—No immigration visa

Lodged: Act of 1917, Committed crime within 5 years
to wit: Fraud

APPLICATION: Suspension of deportation—economic detri-
ment

On January 28, 1952, the Assistant Commissioner entered an order that the hearing be reopened to afford counsel an opportunity to produce witnesses and documentary proof, such as certified copies of the respondent's income tax returns for the past five years and a financial statement prepared preferably by a certified public accountant to show the respondent's exact and complete assets, liabilities, annual income and source from which derived, and for such other purposes as may be deemed appropriate.

Respondent's Exhibit A

Findings of fact and conclusions of law of the Hearing Officer relating to deportability and served on the respondent are hereby adopted.

DISCUSSION OF THE EVIDENCE: The record of hearing shows that the respondent applied for suspension of deportation and in the alternative for voluntary departure and preexamination and for the privilege of the 7th Proviso.

The respondent married a legally resident alien on April 23, 1949. There is one child, born at Newark, New Jersey on October 8, 1951, as an issue of this union. The respondent's wife has testified that she is completely dependent upon her husband for support. The respondent has testified that since 1941 or 1942 he has supported his 78-year-old father who was lawfully admitted to the United States in 1939 for permanent residence. On June 21, 1948, the father of the respondent testified he had no assets or income and is completely supported by the respondent. Evidence was presented in the present reopened hearing to show that the respondent's father, during the years 1943 an 1944, made gifts to his daughter-in-law, one Theresa Accardi, for the purpose of purchasing certain premises. These gifts amounted to a total of $50,700.

Four witnesses were presented during the reopened hearing. The first witness was one William M. Bilow who testified that since 1945 he has known and been associated with the respondent in real estate transactions and that he terminated his partnership in November 1951, by selling his shares to another person. He stated that he has heard nothing bad about the respondent, thinks very highly of him and that he is a "perfect gentleman." He estimated that they jointly derived $12,000 per year from rents of

the properties owned by them. The record does not indicate whether the $12,000 was gross or net profits. He has no knowledge that the respondent has been associated in lottery activities.

The second witness, one John B. Modica, testified that he has known the respondent since 1937 or 1938, when the respondent was bringing "tomatoes, olive oil and stuff" to the house and became a little more friendly with the respondent in 1942 or 1943, and in 1950 saw him almost daily and never heard anything detrimental to the respondent. This witness testified that he became vice-president of the Teac Corporation in December, 1951, but does not own any stock or shares in said corporation or receives any salary; that the only remuneration is commissions which he receives through the sale of property of the Teac Corporation. He stated that since December, 1951 he has received roughly $3500 to $3600 as part of the commissions from the sale of eighteen houses.

The third witness was on Gerard T. Capodanno, who testified that he is a practicing attorney and member of the New Jersey Bar. This witness stated that he first met the respondent a little better than three years ago and became close friends. This witness testified that the activities of the respondent were legitimate and that he is a person of good moral character.

The fourth witness was one Pat Serra who testified that he is an investigator in the Office of the Mayor of the City of Newark, New Jersey. This witness has stated that he has known the respondent since 1945, and seems to have knowledge of the property owned by the respondent. This

Respondent's Exhibit A

witness has testified that he has been instrumental in attempting to clear the respondent's immigration difficulties. Although he has stated the respondent was rather close-mouthed, it appears he told him everything. This witness stated he made arrangements for the marriage of the respondent before Judge Tully. He has testified that he feels that the respondent was "getting a dirty deal in this immigration matter." He explained that by "dirty deal" he meant that the respondent was being required to appear at various times for further investigation or hearings. He considers the respondent "one of the most outstanding men" he has ever met in his entire life.

The respondent presented in evidence photostatic copies of his income tax returns for the years 1946, 1947, 1948, 1949 and 1950, which shows that he claimed his father for exemption. Counsel for the respondent was unable to present a certified statement of the respondent's assets and liabilities due to the death of the father of the accountant. The date of the order of the Assistant Commissioner was January 28, 1952, copy of which, was apparently received by counsel within a few days thereafter. Sufficient time has been afforded the respondent to have the required statement prepared prior to the date of the reopening of the hearing April 16, 1952 or the continuation thereof on April 30, 1952. As there did not appear any justification to grant another adjournment of the hearing to permit the presentation of a financial statement, request of counsel for such adjournment was denied. The respondent was unable to state his net worth other than it was between $15,000 and $20,000.

It has been said that the power of suspending deportation is a discretionary one and relief from deportation is not a

matter of right but of discretion. (Matter of A———, Int. Dec. 109). It is therefore concluded that the granting of any discretionary relief as prayed for by the respondent does not appear warranted. An order of deportation should be issued.

RECOMMENDATION: It is recommended that the respondent's application for suspension of deportation and in the alternative for voluntary departure and in addition for the privilege of preexamination and the exercise of the 7th proviso to Section 3 of the Immigration Act of 1917, be denied.

IT IS FURTHER RECOMMENDED that the alien be ordered deported pursuant to law on the charge stated in the warrant of arrest.

(Signed) MANUEL BOTEILHO
MANUEL BOTEILHO
Hearing Officer

R-5/14/1952
T-5/15/1952

Respondent's Exhibit A

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

July 7, 1952

File: A-4373872—New York (No Appeal)

In re: JOSEPH ACCARDI or GIUSEPPE ACCARDI

IN DEPORTATION PROCEEDINGS

IN BEHALF OF RESPONDENT: Herbert C. Smith, Esquire
1122 South Orange Avenue
Newark, New Jersey

CHARGES:

Warrant: Act of 1924—No immigration visa

Lodged: Act of 1917—Sentenced one year or more for crime involving moral turpitude committed within five years after entry—Conspiracy to defraud the United States (18 U. S. C. 88)

APPLICATION: Suspension of deportation or voluntary departure, preexamination and 7th Proviso

DETENTION STATUS: Released under bond

DISCUSSION: Upon consideration of the entire record, including the exceptions taken, the findings of fact, conclusions of law and order of the Hearing Officer are hereby adopted.

The respondent is a 42 year old alien, a native and citizen of Italy. He testified he entered the United States in 1932

for the first time and remained here since; that he intended to remain in the United States when he came here in 1932, although not in possession of an unexpired consular immigration visa. He is subject to deportation on the documentary charge stated in the warrant of arrest.

He was convicted in 1941 for conspiracy to defraud the United States in violation of 18 U. S. C. 88 (Exhibit 3), over a period between January 1934 and January 1937. He received a suspended sentence and was placed on probation for 24 months.[1] Since the evidence does not disclose that the respondent was imprisoned at any time as a result of his conviction of the foregoing offense, the lodged charge is not sustained.

The respondent has applied for suspension of deportation or voluntary departure with preexamination privilege together with 7th proviso relief. This 42 year old alien has lived in this country about 20 years. He sought preexamination in 1945 and later sought 7th proviso relief in regard to the above conviction. A warrant of arrest was issued in 1947 and hearings were conducted in 1948 and 1949. Following the decision of Supreme Court in the case of Wong Yang Sung vs. McGrath, 339 U. S. 33, 908 on February 20, 1950 a hearing de novo was accorded the alien in August 1951 and the Hearing Officer recommended deportation. On January 28, 1952, the Central Office ordered the hearing

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1 The sentence which was suspended was for one year and a day. Exhibit 8 (FBI Report) introduced into the record (p. 14) shows that for other indictments for similar violations, the disposition on November 6, 1941, was (1) sentenced to 1 day in custody of U. S. Marshal; (2) On December 30, 1941, nolle prosse; (3) on February 26, 1942, sentenced to one day in custody of U. S. Marshall.

reopened so that additional evidence could be adduced on behalf of respondent, as was urged by the attorney. A reopened hearing has now been conducted and on May 15, 1952 the Hearing Officer recommended deportation as well as a denial of discretionary relief.

The respondent was married in 1949 to a lawfully resident alien and a native born child was born to them on August 28, 1951. He has presented witnesses who have testified favorably as to his moral character and the record contains affidavits to the same effect.

However, his arrest record shows that he was charged in 1933 as being a disorderly person, (disposition in that case not being indicated); charged for possession of lottery slips in 1934, which was nolle prossed; in 1934 he was received at Gloucester County Prison, Woodbury, New Jersey on a liquor violation. He has had several indictments by a Federal Grand Jury for violation of Internal Revenue laws, the last indictment being in 1[illegible] of which he was convicted as stated above, i.e., conspiracy to defraud the United States (18 U. S. C. 88). His income tax reports show that he claimed his father for exemption. An investigation is being conducted in regard to income tax returns for a number of preceeding years.

This claim of income tax exemption for the father is in contrast to what was indicated in Exhibits 8, 9, and 10 which were submitted to show the father has turned over sums amounting to $50,000 to the respondent's wife in 1943-1944. In addition the final estimate given the respondent's assets clear of debt was about $20,000. The respondent's source of income has been examined through the witnesses he submitted and through other evidence emanating from him,

but the record is not free from doubt as to whether there are unexplained sources of income. This evidence has been evaluated and discussed in detail by the Hearing Officer. In view of all the circumstances regarding his sources of income, his assets, and his manner of earning a living, together with his previous arrest record and his conviction record, it is indicated that relief from deportation is not justified in this case, both in respect to submitting the case to Congress for suspension of deportation or the grant of extraordinary relief under the 7th proviso to Section 3 of the Act of February 5, 1917. Accordingly, the relief sought will not be granted.

ORDER: It is ordered that the alien's application for suspension of deportation or voluntary departure with preexamination and 7th proviso relief be denied.

IT IS FURTHER ORDERED that the alien be deported from the United States, pursuant to law on the charge stated in the warrant of arrest.

IT IS FURTHER ORDERED that the case be certified to the Board of Immigration Appeals for final decision in accordance with 8 C. F. R. 90.3(b).

(Signed) ELEANOR ENRIGHT
Acting ASSISTANT COMMISSIONER
ADJUDICATIONS DIVISION

JPS/ebf
J.P.S.

Respondent's Exhibit A

U. S. DEPARTMENT OF JUSTICE

BOARD OF IMMIGRATION APPEALS

April 3, 1953

File: A-4373872—New York

In re: JOSEPH ACCARDI or GIUSEPPE ACCARDI

IN DEPORTATION PROCEEDINGS

In Behalf of Respondent: Herbert C. Smith, Esq.
1122 South Orange Avenue
Newark 6, New Jersey
(Heard November 26, 1952)

(Three other persons—respondent and relatives)

CHARGES:

Warrant: Act of 1924—no immigration visa

Lodged: Act of 1917—sentenced for crime committed within 5 years after entry, to wit: Conspiracy to defraud the U. S. (18 U. S. C. 88)

APPLICATION: Suspension of deportation—economic detriment: or voluntary deportation, preexamination and the discretion contained in the 7th Proviso

DETENTION STATUS: Released under bond

This record relates to a 42-year-old alien, native and citizen of Italy, whose last and only entry to the United States occurred at Buffalo, New York during the month of August 1932 at which time he entered this country to remain per-

manently. He was not in possession of an unexpired immigration visa. The warrant of arrest was issued October 21, 1947 and, after appropriate hearing, the alien was found deportable on the charge in the warrant of arrest. The proceedings were reopened by the Assistant Commissioner on January 28, 1952 to receive further evidence concerning the application for discretionary relief.

The reopened hearing was accorded in April 1952 after which the Hearing Officer denied discretionary relief and entered an order for deportation on the charge in the warrant of arrest. On July 7, 1952 the Acting Assistant Commissioner considered the case, denied discretionary relief, ordered deportation solely on the charge in the warrant of arrest, and certified the case to this Board for final decision.

No issue is raised in this case relative to deportability which is solely on the charge in the warrant of arrest. The charge lodged in the proceedings is not sustained. This charge was predicated on the conviction of the alien in 1941 for conspiracy to defraud the United States in violation of Title 18, U. S. C. 88, which overt acts occurred between January 1934 and January 1937. The alien received a suspended sentence of 24 months.

This record shows that this alien was granted the privilege of preexamination on April 6, 1945. Thereafter, the American Consul at Montreal, Canada declined to consider his application for an immigration visa because of the alien's conviction for conspiracy to defraud. As previously stated the warrant of arrest was issued on October 21, 1947.

Counsel has appeared in oral argument and has insisted that there is no positive proof of any acts of misconduct on

the part of this alien during the past five years, that should operate to preclude the granting of discretionary relief.

This alien has been living in the United States for a period of 21 years. He is married to a legally resident alien and has one infant child born in this country in 1951. The spouse and child are dependent on the alien for support. It is stated that the alien's spouse is a petitioner for naturalization.

The respondent alleges that he is worth between $15,000 and $20,000 (p. 22-r). Evidentiary data in the record is to the effect that the subject has been engaged in the sale or transfer of real estate and has received some income in the nature of commissions on the sales. The alien has testified that he is part owner of certain properties some of which he is trying to sell. He also owns a farm equipped with machinery and stocked with livestock, worth about $40,000. He receives a salary of $130 per month for collecting rents for his sister-in-law and about $100 per month for collecting rents on other properties.

The record shows that the father of this alien came to the United States in 1939, and thereafter conveyed assets or property to the value of $50,000 to his daughter-in-law as gifts. This alien alleges that he has supported his father since 1946. During the period since the date last mentioned, at least, the alien has claimed his father as a dependent in income tax returns. The alien offers as an explanation the excuse that his father is unable to maintain himself due to ill health.

Affidavits of persons well acquainted with the alien, character investigations by the Service and the testimony of four

witnesses placed in this proceeding establish that the alien is considered a person of good moral character. The facts stated by the character witnesses have been discussed by the Hearing Officer in his decision. As previously stated, the alien has been the subject of warrant proceedings during the past 5 years.

This respondent has been arrested on several occasions between 1933 and 1940 or 1941. He was arrested in 1933 and charged with being a disorderly person; in 1934 for possession of lottery chips and violation of the liquor laws, respectively; and in 1940-1941 for conspiracy to defraud the United States which acts were committed between 1934 and 1937.

Relief from deportation is a matter of administrative discretion and not a matter of right. This alien has been in the United States several years, and although he was granted preexamination in 1945, he has been unsuccessful in the adjustment of his immigration status. After consideration of all the facts and circumstances in the case, we believe that the applications for relief should be denied as a matter of administrative discretion.[1]

ORDER: It is ordered that the alien's applications for discretionary relief be denied.

IT IS FURTHER ORDERED that the decision of the Hearing Officer in this case which was adopted and certified to this Board for final decision by the Assistant Commissioner on January 28, 1952, be and the same is hereby affirmed.

/s/ THOMAS G. FINUCANE
Chairman

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1 *U. S. ex rel. Weddeke* v. *Watkins*, 186 F. 2d 369; and *Kaloudis* v. *Shaughnessy*, 180 F. 2d 489.

Respondent's Exhibit A

May 8, 1953

IN THE MATTER	)	
OF	)	FILE: 4373872—New York
JOSEPH ACCARDI	)	

IN DEPORTATION PROCEEDINGS

IN BEHALF OF RESPONDENT: Herbert C. Smith, Esquire
1122 South Orange Avenue
Newark, New Jersey

The motion now before us sets forth that the petitioner had been at large under bond in the sum of $2,500, one of the conditions thereof requiring that he report every Monday at the Immigration Office, Newark, New Jersey; that he so reported on Monday, April 20, 1953, and that a few hours thereafter was taken into custody and has had no opportunity to settle his affairs; that because of the urgency thereof the alien desires a stay of deportation for a period of six months in order to dispose of his farm, livestock, and other property and to settle his business affairs in this country. The motion requests that the proceedings be reopened and that the warrant of deportation be held in suspension.

We first considered this case on appeal on April 3, 1953. The Board denied the alien's application for discretionary relief and affirmed the action taken below. The action below directed his deportation pursuant to law on the charge

set forth in the warrant of arrest. The detailed facts in this case are set forth in the decision below and our decision of April 3, 1953.

The matters set forth in the motion now before us point essentially to a stay of deportation. Under applicable regulations, stay of deportation is exclusively one for the consideration of the Immigration Service. Accordingly, we are compelled to dismiss said motion.

ORDER: It is ordered that the motion be and the same is hereby dismissed.

/s/ THOMAS G. FINUCANE
Chairman

Decision and Order Appealed From

—153—

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 85-78

UNITED STATES OF AMERICA, *ex rel.*
JOSEPH ACCARDI,

Relator,

—v.—

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization Service, New York District,

Respondent.

Appearances:

JACK WASSERMAN
Attorney for Relator
Warner Building, Washington, D. C.
Irving Radar
320 Broadway, New York, N. Y.
Of Counsel

J. EDWARD LUMBARD
United States Attorney for the Southern District of New York
Attorney for Respondent
Harold J. Raby
Assistant United States Attorney
Lester Friedman
Attorney, Immigration and Naturalization Service
Of Counsel

Decision and Order Appealed From

McGOHEY, *D. J.*:

On review of a denial of a previous writ, the Supreme Court reversed, holding that the relator was entitled to an

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opportunity, which he had not been afforded, to prove in the District Court a charge of unfairness alleged in his petition.[1] On the present writ he has been afforded and has availed himself of such opportunity. He was represented by able counsel of his own choice, and all the evidence offered on his behalf was received. It consists of oral testimony before me by the Chairman of the Board of Immigration Appeals, the depositions of the other members of the Board, of the former Attorney General and of a Special Assistant to the Attorney General, together with several documentary exhibits. The respondent called no witnesses.

The sole issue which the Supreme Court left to be passed on here is whether the Board of Immigration Appeals exercised an independent and uncoerced judgment in denying relator's application for suspension of deportation. Relator charges that the Board did not but, on the contrary, followed the command of the then Attorney General to deny relator relief so that he could be deported. This command, it is alleged, was made known by the Attorney General's public announcement and private communication to the Board of the names of persons "he wanted deported."

From all the testimony and exhibits the following facts are found:

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1. In the fall of 1952 the then Attorney General inaugurated and publicly announced a program to deport aliens

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1 *Accardi* v. *Shaughnessy*, 347 U.S. 260.

believed to be engaged in subversive activities or in organized crime. He set up a group of members of his staff to coordinate the work of various agencies of the Government cooperating in the program. The Board of Immigration Appeals was not one of those agencies.

2. An important source of information for the group was the files of the Federal Bureau of Investigation.

3. When an appeal by any alien of either of the classes described reached the Board of Immigration Appeals, the Chairman of that Board was notified either orally or in writing that such alien was one of those embraced in the Attorney General's program. This notification was sometimes passed on to other Board members, sometimes not. The purpose of the notification, and it was so understood by the Board, was merely to indicate that the Attorney General desired expeditious consideration and determination of the appeal.

4. Neither such notification nor the existence of the program was considered by the Chairman or by any Board member as a direction by the Attorney General, or even as a hint by him, to decide an appeal adversely to an alien. Moreover, these matters were given no weight by the Board in their deliberations.

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5. Accardi was a deportable alien believed by the Attorney General to have been engaged in organized crime. He had been ordered deported. His application for suspension of deportation having been denied he appealed to the Board for review. In accordance with the practice in such cases, notice was given to the Board that Accardi was an alien embraced within the Attorney General's program.

6. The Attorney General never discussed his program with the Chairman or any Board member. There is no evidence, nor is it claimed, that he ever discussed this relator's or any other case with any of them.

7. The Board members and each of them who considered Accardi's appeal reached their individual and collective decision on the merits, free from any dictation or suggestion by the Attorney General or any of his assistants or anyone else acting or purporting to act for him.

8. The Board's adverse decision on Accardi's appeal is adequately supported by the evidence before the Board.

This Court has had the advantage of seeing and hearing the Board's Chairman on the stand and accepts completely his testimony which was neither shaken nor controverted. The testimony of the other witnesses was introduced through their depositions, all of which have been carefully read. It is significant that none of this testimony is in any

—157—

respect contradicted or shaken. Relator's position here reduces to the mere suggestion that the Court should disbelieve the witnesses' denials and accept the inferences relator draws from the existence of the Attorney General's program and the practice of notification. I find no rational basis for disbelieving the witnesses, and relator's inferences are clearly refuted by the testimony which is fully accepted.

The relator has failed to prove his charge.

The writ is dismissed and it is

So Ordered.

Dated: New York, N. Y., July 15, 1954.

JOHN F. X. McGOHEY
U. S. D. J.

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Notice of Appeal

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action 85-78

UNITED STATES OF AMERICA, *ex rel.*, JOSEPH ACCARDI,

Relator,

—against—

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service, New York District, Department of Justice,

Respondent.

The above named Joseph Accardi, the relator herein, hereby appeals from the Order of the District Court dated July 15, 1954, dismissing the Writ of Habeas Corpus.

JACK WASSERMAN
Attorney for Relator

IRVING RADAR, Esq.
320 Broadway
New York, N. Y.
Of Counsel

Notice of Appeal

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal has been served on the Attorney for the Respondent by mailing a copy thereof to the Assistant United States Attorney, Southern District of New York, U. S. Court House, Foley Square, New York, N. Y., this 27th day of July, 1954.

JACK WASSERMAN
Attorney for Relator

Stipulation

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action 85-78

UNITED STATES OF AMERICA, *ex rel.*, JOSEPH ACCARDI,

Relator,

—v.—

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service, New York District, Department of Justice,

Respondent.

It is hereby stipulated by and between the attorneys for the parties herein that the record on appeal herein consist of the following:

1. Petition for Writ of Habeas Corpus dated May 15, 1953.

2. Affidavit of Lester Friedman, consisting of one page, dated May 10, 1954.

3. Writ of Habeas Corpus dated May 10, 1954.

4. Return to Writ of Habeas Corpus of Lester Friedman dated May 10, 1954.

5. Affidavit of Lester Friedman, consisting of eight pages dated May 10, 1954.

McGranery said he cannot publicly discuss his anti-Communist program of denaturalization and deportation in any detail, but noted that "We deported 31 alien Communists this year."

In listing the underworld targets, McGranery indirectly took note of fears expressed by Sen. John J. Williams (R-Del.) that Frank Costello might be deported before he could be used to testify against other racketeers.

McGranery gave assurance that none of those involved would be deported until each has "paid his debt to society." Costello is now serving an 18-month term for contempt of Congress.

Costello, a native of Italy, is a naturalized citizen. Lias, 400-pound retired gambler and now owner of the Wheeling Downs racetrack, claims he is a citizen, but the department lists him as a native of Greece.

Circella is the target of deportation action and McGranery said he came here from the British West Indies in 1929, accompanied by Capone. Polizzi who has a police record dating back to 1920, is a native of Sicily and was naturalized in Cleveland in 1928.

Volpe, a native of Argentina, naturalized in Chicago in 1920, is "alleged to have been the personal bodyguard and the executioner for the late Al Capone," said McGranery. Voiler, a Romanian, has a record dating back to 1918, he said.

THE NEW YORK TIMES

New York, Friday, October 3, 1952

M'Granery Starts a Drive to Deport Alien Racketeers

Campaign Includes Moves to Denaturalize Those Who Have Taken Out Citizenship

100 Gangsters Involved

Attorney General Says He Also Will Continue to Rid U. S. of Foreign-Born Reds

By Lewis Wood

Special to The New York Times

WASHINGTON, Oct. 2—James P. McGranery, Attorney General, announced today a drive to take United States citizenship from naturalized racketeers and criminals, then eject them from this country.

He told a news conference that steps already had been taken against a half dozen undesirable aliens, and that the program would continue against "close to 100 figures in the underworld and organized crime." Mr. McGranery predicted that his plan

Stipulation

6. Traverse of Joan Accardi dated May 27, 1954.

7. Affidavit of Joan Accardi dated May 27, 1954.

8. Interrogatories of Relator, dated May 27, 1954.

9. Response to Interrogatories by Lester Friedman, —160— dated June 9, 1954.

10. Affidavit of Lester Friedman, dated June 23, 1954.

11. Deposition of Robert Charles, and others, dated June 29, 1954.

12. Stenographer's Minutes of the Hearing, dated June 23, 1954.

13. Relator's Exhibit 1 to 8A.

14. Respondent's Exhibit A.

15. Opinion and Order of Judge McGohey, dated July 15, 1954.

16. Notice of Appeal, dated July 27, 1954.

17. This Stipulation.

August 27, 1954

JACK WASSERMAN
Attorney for Relator

J. EDWARD LUMBARD
United States Attorney for the Southern District of New York

Stipulation as to Contents of Appendix

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, *ex rel.*, JOSEPH ACCARDI,

Relator-Appellant,

—v.—

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service, New York District, Department of Justice,

Respondent-Appellee.

IT IS HEREBY STIPULATED, pursuant to Rule 15(d) of the Rules of the Court of Appeals, that the foregoing constitutes the joint printed appendix of the parties herein.

Dated: New York, N. Y., August 30, 1954.

JACK WASSERMAN,
Attorney for Relator-Appellant.

J. EDWARD LUMBARD,
United States Attorney for the Southern District of New York,
Attorney for Respondent-Appellee.

would "restore the dignity of citizenship" and "do much to destroy the roots of organized crime in America."

He also promised to rid the country of naturalized Communists. And there will be no relaxation in the program of deporting Communist aliens, the Attorney General asserted. Thirty-one persons have been deported so far in 1952, he added.

Mr. McGranery denied that there were any political implications in announcing his campaign at a time when Republicans were assailing the Administration for alleged laxity in proceeding against subversive persons. He said that the study under which he would proceed had been going on for weeks, and that he had considered it long before taking his Cabinet office last May.

McGranery Attacks Chaplin

Mr. McGranery spoke critically of Charlie Chaplin, the British-born film actor, whom Immigration authorities will question closely before he will readmitted to this country. If assertions about Mr. Chaplin are true, "he is in my judgment an unsavory character," the Attorney General said, adding:

"He has been publicly charged with being a member of the Communist party, and with grave moral charges, and with making statements that would indicate a leering, sneering attitude toward a country whose hospitality has enriched him."

The Attorney General again said that he would start denaturalization proceedings against Frank Costello, the gambler, who is now serving an eighteen-month prison sentence for contempt of Congress. The Justice Department has accused Costello of concealing his criminal record when he obtained United States citizenship in 1925. Mr. McGranery said that the gambler would have to "discharge in full his obligation to this country" before deportation proceedings would begin.

As an example of the persons he seeks to deport, Mr. McGranery cited Nicholas D. Circella, who was arrested in Chicago today on a deportation warrant.

The Attorney General said that Circella, who had a long criminal record, last entered this country in 1929, accompanied by Al Capone, the gangster, and that at the time Circella wrongly claimed United States citizenship.

Other Proceedings Started

Denaturalization proceedings also have been started against the following three men, Mr. McGranery said:

Hyman Chaim Stromberg, arrested at Miami. A native Russian, who was naturalized in New York in 1915, Stromberg was reported to have "controlled the numbers, bookmaking and other gambling activities in Philadelphia for more then ten years."

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1954

No. 97

Argued November 8, 1954

Docket No. 23191

UNITED STATES OF AMERICA, EX REL. JOSEPH ACCARDI, RELATOR-APPELLANT

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK DISTRICT, DEPARTMENT OF JUSTICE, RESPONDENT-APPELLEE

Before: Clark, Chief Judge, and Frank and Harlan, Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, dismissing a writ of habeas corpus, McGohey, Judge. Reversed and Remanded.

Jack Wasserman, Washington, D.C. (Irving Radar, of counsel, New York, N.Y.) for relator-appellant.

J. Edward Lumbard (Harold J. Raby and Lester Friedman, of counsel) for respondent-appellee.

OPINION—Decided January 7, 1955

After the Supreme Court remanded, pursuant to its opinion in Accardi v. Shaughnessy, 347 U.S. 260, the case went to trial, on a new petition for a writ of habeas corpus before a judge (without a jury). The judge made an order dismissing the writ. From that order relator appeals.

FRANK, Circuit Judge:

1. We shall assume familiarity with the facts stated in our previous opinion, 206 F. (2d) 897, and in the opinion of the Supreme Court, 347 U.S. 260. We do stress one fact: The particular kind of discretionary relief sought by Accardi was suspension of deportation, pursuant to Section 19(c) of the Immigration Act of 1917, as amended in 1948, which, so far as pertinent, provides:

> "In the case of any alien (other than one to whom subsection (d) of this section is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may . . . suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is

solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon July 1, 1948." 8 U.S.C. (1946 ed. Supp. V) Sec. 155(c).

2. Printed in the Appendix to this opinion are certain "public announcements of the Attorney General, consisting of newspaper reports of interviews with him and of "press releases" issued by him. They were not called to our attention on the previous appeal. But they were submitted by the government to the Supreme Court. Apparently the Supreme Court took judicial notice of them, since it referred to and relied upon them in its opinion. These data were received in evidence at the subsequent trial and are now in the record before us. They are significant because of the following portions of the Supreme Court's opinion:

"We think the petition for habeas corpus charges the Attorney General with precisely what the regulations forbid him to do: dictating the Board's decision. The petition alleges that the Attorney General included the name of petitioner in a confidential list of 'unsavory characters' whom he wanted deported; public announcements clearly reveal that the Attorney General did not regard the listing as a mere preliminary to investigation and deportation; to the contrary, those listed were persons whom the Attorney General 'planned to deport.' And, it is alleged, this intention was made quite clear to the Board when the list was circulated among its members. In fact, the Assistant District Attorney characterized it as the 'Attorney General's proscribed list of alien deportees.' To be sure, the petition does not allege that the 'Attorney General ordered the Board to deny discretionary relief to the listed aliens.' It would be naive to expect such a heavy-handed way of doing things. . . . If petitioner can prove the allegation, he should receive a new hearing before the Board without the burden of previous proscription by the list. After the recall or cancellation of the list, the Board must rule out any consideration thereof and in arriving at its decision exercise its own independent discretion, after a fair hearing, which is nothing more than what the regulations accord petitioner as a right."

3. The government contends that, reasonably construed, those published utterances of the Attorney General could mean no more than that the hearings of persons included in his "program" should be "expedited." The government, explicitly and repeatedly, ad-

vanced that same contention in its brief in the Supreme Court.[1] It seems obvious that the Supreme Court rejected it.

4. If more were needed as to the meaning of the Attorney General's statements and "releases," we now have the testimony of the then Attorney General, McGranery, which amply supports the Supreme Court's interpretation.[2] We must take it, then, that the

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[1] The following are excerpts from that brief:

Petitioner's "case rests entirely upon the fact that officials of the Department of Justice have (1) performed their duty to bring deportation proceedings against aliens residing here illegally, (2) *expedited cases* of aliens deemed to be particularly undesirable, (3) believed petitioner to belong to this class, and (4) made public statements describing these activities. . . ."

"There is nothing extraordinary, therefore, in the fact that efforts should be made by the Department of Justice to *expedite proceedings* against deportable aliens whose presence here is deemed particularly undesirable. Nor is it surprising that *public statements* . . . should be made *describing these efforts.*"

Other similar cases "were *expedited* under the Attorney General's program to insure enforcement of the deportation laws against aliens believed to be especially undesirable."

(The emphases in the above quotations are added.)

[2] The following are excerpts from his deposition testimony:

"Q. Were you the Attorney General of the United States on October 2, 1952? A. Yes.

"Q. Did you hold a press conference in your office in Washington, D. C. on that date? A. I did.

"Q. Does the official press release of the Department of Justice contain the announcement which you made on that date? A. A copy of the release is here, and it does.

"Q. Do the news items of October 3, 1952 in the Washington Star, The Washington Post and the New York Times, accurately reflect your statements to the press? A. They do. . . .

"Q. When Jack Ignatius Dragna was arrested for deportation on December 8, 1952, the official press release of that day by the Department of Justice said:

> "'The arrest, . . . , was another step in his denaturalization and deportation program deemed at ridding the nation of undesirable aliens engaged in racketeering and other criminal activities.'

A. You can underline that 'undesirable aliens.'

"Q. Did the aforesaid quotation accurately reflect your program? A. That is right. That reflects accurately my program. . . .

"Q. At the time of your press conference, according to the news-

Attorney General's clearly stated intention was to deport anyone named by the Attorney General as within his program.

5. We read the Supreme Court's opinion as holding this:

(a) The Attorney General's statements, reported in the press and in his press releases, "clearly reveal that the Attorney General did not regard the listing as a mere preliminary to investigation and deportation," but, "to the contrary," showed that "those listed were persons whom the Attorney General 'planned to deport.'"

(b) Accardi is entitled to a new hearing before the Board—of the kind described by the Supreme Court—if at a trial in the district court he can prove that

(1) he was one of the persons to whom the Attorney General thus referred, and

(2) a majority of the Board knew that fact, and

(3) the majority was affected by it when the Board denied him discretionary relief.

6. The evidence leaves no doubt that Accardi was so named.

7. Was the Board informed of this fact? The trial judge so found, stating: "In accordance with the practice in such cases, notice was given to the Board that Accardi was an alien embraced within the Attorney General's program." He made this finding, despite the oral testimony of the Board's Chairman that, previous to the Board's decision, he had no such knowledge. As this finding has support in the deposition-testimony of one Board member, and as two other members, also testifying by deposition, said they could

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paper accounts, you had included within your program such persons as Frank Costello, Nicholas Circella, William Lias, Hyman Shomberg, Alfred Polizzi, Harry Voiler and Anthony Volpe. The Government had admitted that Joseph Accardi was within your program. Do you recall whether he was included before or after your announcement of October 2, 1952? A. Joseph Accardi's case was one of the earliest cases submitted, and his case was already on appeal at the time. I think now—if I am incorrect, you correct me—Joseph Accardi's case had been heard by the Hearing Commissioner before and prior to October 2, 1952.

"Q. That is correct. A. But my investigation and the record of Accardi proved him, to my satisfaction, to be racketeer. That is why I put him on there. . . .

Q. Attorney General Brownell has stated in press releases that Joseph Accardi is a racketeer. Do you recall whether he was included within your program because you or your staff considered him to be a racketeer? A. He was one of the first. . . . My investigation of Accardi indicated that he was a racketeer and that is the reason I moved to deport him."

not remember whether or not they then had had such knowledge, we saw no reason why we should not accept that finding.[3]

8. This leaves but one issue of fact: Was a majority of the Board members influenced by that knowledge? All the Board members testified they were not, because, they said, a notification from the Attorney General that any particular alien was within his "program" meant, to them, merely that the Attorney General desired an expeditious consideration and determination of that alien's case. The trial judge, on the basis of that testimony, found that such was the Board's understanding;[4] and he grounded his decision primarily on that finding, saying that he could see "no rational ground for disbelieving the witnesses" on that score.

This finding, based on that testimony, cannot stand up. We accept it as a fact that the Board members *consciously* believed, when they testified, that the Attorney General's statements amounted to no more than a calendar order (i.e., a direction to give preference, merely in point of time, to consideration and decision of such cases), and that, beyond that, those statements did not have any effect on the Board's decisions. But it is incredible, human nature being what it normally is, that the Attorney General's statements—as interpreted by the Supreme Court and the former Attorney General—did not *unconsciously* influence the Board members so that they felt obliged not to exercise their discretion and, without doing so, to decide against Accardi. Any other finding involves reliance on so remarkable a degree of improbability as to be untenable.

Yet the rejection of the finding does not imply any challenge of the intelligence or integrity of the Board members. One need not turn to the works of Freud and his disciples to learn that un-

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[3] The Board consists of five members.

[4] His pertinent findings read as follows:

"The purpose of the notification, and it was so understood by the Board, was merely to indicate that the Attorney General desired expeditious consideration and determination of the appeal. Neither such notification nor the existence of the program was considered by the Chairman or by any Board member as a direction by the Attorney General, or even as a hint by him, to decide an appeal adversely to an alien. Moreover, these matters were given no weight by the Board in their deliberations. . . . The Board members, and each of them who considered Accardi's appeal, reached their individual and collective decision on the merits, free from any dictation or suggestion by the Attorney General or any of his assistants or anyone else acting or purporting to act for him."

conscious influences importantly affect the memory of honest men; such teachings will be found in the writings of Plato, Aristotle, Euripides, Dante, Montaigne, Shakespeare, Moliere, Pascal, Pope, Byron, Dr. Oliver Wendell Holmes and his sagacious son, to say nothing of novels since Fielding to the present. Indeed, the courts have long recognized that, stimulated by interest, pride or other motives, thoroughly honest and intelligent witnesses may tell unbelievable stories. The books are full of comments like these: "No class of men know better than judges, how much interest may unconsciously warp an honest mind."[4a] "Our memories are easy and ofttimes unconscious slaves to our wills."[4b] Accordingly, a court may discredit the testimony of a witness "without casting any shade of doubt upon his character."[4c] "The statements of some are unconsciously affected by their wishes, hopes or prejudices."[4d] Judges have spoken of the "ease with which honest witnesses can persuade themselves that they remember some bygone circumstance which they are ingeniously induced to think that they remember";[4e] of "how extremely prone persons are to believe what they wish."[4f] Because of interest, "very honest persons (such is the infirmity of our nature) often deceive themselves without being aware of it"; they "will often give false color in a transaction, without . . . intending to speak falsely or to suppress the truth."[4g] The judiciary has thus acknowledged the wisdom of the aphorism: "Memory says, 'I did this'; pride says, 'I could not have done it'; eventually pride wins."

The courts, too, have often held that a highly improbable story requires "strong corroboration,"[4h] and that "inherently improbable" testimony, not adequately explained, should be disregarded.[4i] "The

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[4a] *Grant* v. *Bradstreet*, 87 Me. 583, 609, 33 Atl. 165, 173.

[4b] *Thomas* v. *Ribble*, 24 S.E. 241, 245.

[4c] *Fisler* v. *Porch*, 10 N.J. Eq. 243, 245.

[4d] *United States* v. *Flint*, 25 Fed. Cas. No. 15,121 (at p. 1111).

[4e] *Hershey* v. *Blacksley*, 33 Fed. 922, 924.

[4f] *Crouch* v. *Hooper*, 16 Beav. 182, 185.

[4g] *Marsh* v. *Tyrrell*, 4 Eng. Ecc. 33, 46.

See also *Vreeland* v. *Vreeland*, 48 N.J. Eq. 56, 21 Atl. 627, 630; *Rogers* v. *Rogers*, 97 Md. 573, 55 Atl. 450, 456; *Thayer* v. *Hart*, 20 Fed. 693; *Hunter* v. *Wetsell*, 84 N. Y. 549, 558.

[4h] Moore, Facts (1898) §§ 93, 1146; *Smith et al.* v. *Davis*, C. C. 34 F. 783, 784; cf. The William Gray, 29 Fed. Cas. 1300, 1302.

[4i] *Quock Ting* v. *United States*, 140 U.S. 417, 420, 11 S. Ct. 733; *Gindorff* v. *Prince*, 189 F. (2d) 897 (C.A. 2); *The Dauntless*, 9 Cir., 129 F. 715, 721; *Fire Association* v. *Weathered*, 5 Cir., 54 F. (2d) 779; *Emanuel* v. *Kansas City T. & Tr. Co.*, 8 Cir., 127 F. (2d) 175, 180; *Moore*, loc. cit. § 137.

circumstances of a case may be such as to make" evidence "utterly incredible, although there are confident attestations in support of it," said Lord Stowell.[4k] A court, remarked Judge Learned Hand, is not obliged to close its eyes "and assume a credulity which no sensible man can. . . ."[4l] Evidence, as to human conduct, contrary to common experience, will not be accepted.[4m] The "eye of the law" will not "be blinded" by incredible statements,[4n] statements "beyond the pale of credibility."[4o] "The measure of proof required to establish any proposition must necessarily vary with its degree of probability,"[4q] and must be strong in proportion to the degree of improbability.[4r]

Pertinent here is the following: (1) In its opinion, issued on April 3, 1953, the Board said:

> "Affidavits of persons well acquainted with the alien, character investigations by the Service and the testimony of four witnesses placed in this proceeding establish that the alien is considered a person of good moral character."

[4k] *The Argo*, 1 C. Rob. 158, 159, quoted in Moore, loc. cit. § 140.

[4l] *Ramopa Company* v. *A. Gustun & Co.*, S.D. D.C., 278 F. 557, 559.

[4m] *Gardner* v. *Gardner*, 2 A.C. 723, 730, 736; *Earle* v. *Norfolk, etc. Hosiery Co.*, 36 N.J. Eq. 188, 194; *New York & Brooklyn Ferry Co.* v. *Moore*, 102 N.Y. 667, 6 N.E. 293, 298; *Vreeland* v. *Vreeland*, 48 N.J. Eq. 56, 21 Atl. 627, 631; *Whelen* v. *Osgoodby*, 62 N.J. Eq. 571, 50 Atl. 692, 694; *Gardner* v. *Weston*, 18 Ia. 533, 535; *Hunter* v. *N.Y.O. & W. R. Co.*, 116 N.Y. 615, 23 N.E. 9, 6 L.R.A. 246; *Gurley* v. *Missouri Pac. R. Co.*, 104 Mo. 211, 16 SW. 11, 17; *Groth* v. *Thomann*, 110 Wis. 488, 86 N.W. 178, 181.

[4n] *Hook* v. *Missouri Pacific Ry. Co.*, 162 Mo. 569, 63 S.W. 360, 362.

[4o] *Kramme* v. *The Ship New England*, 14 Fed. Cas. 7,930, p. 852.

[4q] *Haworth* v. *Stark*, C.C., 88 F. 512, 514.

[4r] *Murray* v. *White*, D.C. 9, F. 562, 564; *The Gratitude* v. *The Eutaw*, D.C. 14 F. 479, 481; *The Eldorado*, D.C. 27 F. 762, 763; *Smith et al.* v. *Davis*, C.C., 34 F. 783, 787; *Merritt & Chapman D. & W. Co.* v. *North German Lloyd*, D.C. 120 F. 17, 27; *Morison* v. *Dominion National Bank*, 169 Va. 191, 192 S.E. 707, 711; *Moore*, loc. cit. § 32.

Those more impressed by Latin than English or American, are referred to the moxim, "In obscuris inspici solere quod verisimilius est, aut quod plerumque fieri solet."

In a "press release" issued that same day, the Attorney General announced

> "that the Board of Immigration Appeals has sustained the order of the Immigration and Naturalization Service to deport Joseph Accardi, 43, of Newark, New Jersey. The order charges that he entered the United States at Buffalo, New York, August 19, 1932, without the required immigration visa.
>
> "Accardi, known as a New Jersey racketeer, is a native of Sicily, Italy, and brother of Samuel Accardi against whom denaturalization proceedings are pending in the Federal court at Newark. . . .
>
> "These actions were taken under the current denaturalization and deportation program of Attorney General Brownell against top racketeers and subversives. They are the result of closely coordinated action and intensive investigation by the Federal Bureau of Investigation and the Immigration and Naturalization Service."

We have in mind, too, the Supreme Court's remarks that this Board is not an independent agency—like the Interstate Commerce Commission or the Securities and Exchange Commission—but a "non-statutory board composed of subordinates within a department headed by the individual who formulated, announced, and circulated such views of the pending proceedings" and that it "would be naive to expect such a heavy-handed way of doing things" as an explicit order by the Attorney General to the Board to deny the discretionary relief of suspension of deportation to any alien designated by him.

We conclude, therefore, that the Board members, in deciding against Accardi's application for such discretionary relief—i. e., suspension of deportation—were controlled by what amounted to an order from their superior so to decide. The trial judge's finding is "clearly erroneous," since, "although there is evidence to support it," we "are left with the definite and firm conviction that a mistake has been made committed." *United States* v. *U. S. Gypsum Co.*, 333 U. S. 364, 395; *United States* v. *Oregon Medical Society*, 343 U. S. 326, 339; *McAllister* v. *United States*, —— U. S. —— (November 8, 1954.)

9. To round out the story, it should be noted that the government advances these arguments:

(a) The Attorney General, under the regulations, may reverse any Board decision; therefore, says the government, it is absurd to believe that he gave the Board orders directing how they were to decide any particular cases. The government made this same

contention in its brief in the Supreme Court.[5] As this argument did not persuade that Court, we do not consider it.

(b) In several instances, says the government, the Board has granted discretionary relief to aliens whom the Attorney General had previously named as within the "program." This argument, also, the government made unpersuasively in its brief in the Supreme Court.[6] We may add that there is no evidence that, in those cases, the Attorney General had not withdrawn the names of those aliens from his "program before the Board decided in their favor." Moreover, the Board's chairman significantly testified at the trial that, in every instance where a final decision has been rendered in a case within the "program," the alien was ordered to leave the country voluntarily or to be deported, and that none of such persons was granted suspension of deportation.

10. The Attorney General, on April 23, 1954, a few days after the Supreme Court's decision came down, issued instructions that the Board should not be influenced in its decisions by his "program" but, in each case, should exercise independent judgment.

11. Accardi must be released from custody unless, within a reasonable time, the Board, under those new instructions, holds a new hearing and renders a new decision on his application for discretionary relief.[7] Although the Board has already found that he has a good moral character, he should have the opportunity at the new hearing to offer evidence that he is not and never has been

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[5] In its Supreme Court brief, the government said: "It would be a startling thing indeed . . . to suggest that the Attorney General found it necessary to dictate the Board's decision to spare himself the possible task of reversing a determination with which he disagreed. . . . The short answer again is that both functions—the prosecution of deportation cases and decision on applications for discretionary relief—have been entrusted to the Attorney General. The fact that he performed the first is no ground for launching an inquiry into his performance of the second."

[6] In its Supreme Court brief, the Government said: In some cases which were "expedited" under the Attorney General's program, the "Board of Immigration Appeals has affirmed orders granting" discretionary relief. "In other cases, following orders for deportation, the Board has ordered the proceedings reopened to consider further applications" for such relief. "These instances . . . illustrate that decisions in the Department of Justice to commence deportation proceedings are neither decisions in advance on deportability nor judgments in advance on the propriety of discretionary relief."

[7] Cf. *Mastrapasqua* v. *Shaughnessy*, 180 F. (2d) 999, 1003-1004 (C.A. 2).

a racketeer. For it may be that, in so characterizing Accardi, the Attorney General has confused him with someone else of the same name.

Reversed and remanded.

Appendix

Press Reports and Press "Releases"

Appellant's Exhibits Nos. 4, 5 and 6 (three Newspaper clippings from the Washington Post, Washington Evening Star and New York Times) may be found in the record filed in the United States Court of Appeals on pages 161a, 163a and 165a of the Joint Appendix.

Exhibit U. S. Dist. Court S.D. of N.Y.—Jun. 23, 1954

The Evening Star, Washington, D. C.

Friday, October 3, 1952

McGranery Disavows Political Motives in Moves to Deport 100 Naturalized Citizens, Aliens

The Justice Department's drive to rid the country of some 100 naturalized citizens and aliens with underworld or other unsavory reputations is no sudden face-saving device for the Democratic administration, according to Attorney General McGranery.

He announced late yesterday that six such foreign-born persons, several of whom apparently never became citizens, already have been picked up. Denaturalization or deportation proceedings will be started at once.

These do not include Communists, naturalized or alien. But the overall drive, Mr. McGranery explained, will apply to Communists who might legally be subject to denaturalization or deportation for certain offenses or fraudulent statements.

Nor, at this stage, does it include Charles Chaplin, the actor who is to be questioned by immigration authorities when he returns from a trip to his native England, the Attorney General added.

Exception to Protest

"But if what has been said about Mr. Chaplin is true," he declared, "he is, in my judgment, an unsavory character. It has been publicly charged that he was a member of the Communist Party, and with grave moral charges, and with making statements that would indicate a leering, sneering attitude toward a country whose hospitality has enriched him. No harm can come from a fair hearing."

Mr. McGranery took exception to Mr. Chaplin's recent protest that the Government broke faith with him. Mr. Chaplin said he was granted a re-entry permit and then learned in mid-ocean that, on his return, he would be required to show, as does every alien seeking original entry, that he is admissible under this country's immigration laws.

The Attorney General said a re-entry permit is primarily an identification document and not an agreement that a person can or will be admitted to the United States.

Reporters asked Mr. McGranery whether there was any connection between the current election campaign and the Justice Department's "sudden" moves against such varied personages as Communists, Charles Chaplin or underworld naturalized citizens or unsavory aliens.

Political Aims Denied

The Attorney General declared there was no political purpose. It was obvious, he said, that the investigations, arrests and overall program are the result of many months of planning and work.

He remarked also that, long before he became Attorney General, he advocated such moves.

"Our final goal," he said, "is to restore the dignity of citizenship and to realize the promise of a full life in accordance with American ideals for those who come to us from foreign lands.

"In order to achieve this positive end, it is necessary to thwart the criminal activities as pursued by ungrateful recipients of American hospitality—the naturalized racketeers—who insult the flag and the Nation by disrespect and disobedience to the laws of the land.

"Hence there will be a series of individual petitions to the Federal courts to revoke naturalization. We will pursue a similar course with respect to Communists who have reached their status as citizens through naturalization. In addition, appropriate action for deportation will be taken against the unsavory characters who have continued to be aliens technically as well as in the broader sense."

Six Picked up in Week

The Justice Department previously announced it will move for denaturalization of Frank Costello, New York racketeer now serving an 18-month prison sentence for contempt in refusing to answer questions of the Senate Crime Investigating Committee.

Mr. McGranery yesterday said the following six other persons have been picked up within the past week:

Nicholas D. Circella of Chicago, who, according to the Attorney General, came to this country by plane with the late Al Capone in 1929 and has since built up a long criminal record.

Hyman C. Stromberg of Philadelphia, a Russian native, naturalized in 1945 and described as a big-time bookmaker and number operator.

Alfred Polizzi of Miami, described as a gambler and former bootlegger, who came here from Italy and was naturalized in 1928.

Anthony Volpe of Chicago, recently a bookie and once the personal bodyguard of Al Capone, Mr. McGranery said. Volpe was naturalized in 1920.

Harry O. Voiler of Miami, who Mr. McGranery said is not a citizen but has a criminal record dating back to 1918 in this country.

William G. Lias of West Virginia, millionaire race track owner and former bootleg czar, who disputes Justice Department contention that he was not born in the United States.

Plaintiff's Exhibit #4 U. S. Dist. Co. SD. of N.Y. Jun 23, 1954

The Washington Post

Friday, October 3, 1952

U. S. Plans to Deport 100 Alien Racketeers

By Murrey Marder, Post Reporter

Attorney General James P. McGranery announced yesterday that the Justice Department hopes to strip citizenship rights from 100 foreign-born racketeers and deport them.

At the same time he said the department is speeding up similar moves aimed at foreign-born Communists.

"I'm trying to emphasize the great dignity there is in citizenship," said McGranery.

The crackdowns on underworld figures and subversives who are naturalized citizens require proof that fraud was involved in their naturalization. If that is proved, they will then become targets for deportation action, along with certain non-citizens.

The organized drive at foreign-born racketeers is a far larger program than has been previously indicated.

McGranery named seven underworld figures now in custody for the denaturalization-deportation campaign.

One of them, Nicholas D. Circella, whom McGranery described as a former accomplice of Al Capone, was picked up just yesterday in Chicago, he said.

The others include such figures as Frank Costello, New York gambling "czar," and William G. (Big Bill) Lias, who was recently apprehended in Wheeling, W. Va., and also Hyman Stromberg of Philadelphia, Alfred P. Polizzi of Cleveland, Harry Voiler of Miami and Anthony Volpe of Chicago.

The cases to be presented against these men date back to incidents of 10, 20 or 30 years ago.

Asked why action was just now being instituted, McGranery replied he can only be accountable for procedure during his own short tenure in office. Besides, he noted, it takes time to "find some basis for fraud," and also, "some of these men have controlled political machines."

When a reporter asked if he did not believe it likely that the drive could leave him open to "a Republican charge of 'politics,'" McGranery replied:

"Don't you think that everything and anything lays you open to a charge? Isn't it obvious that this very thorough and painstaking plan couldn't be accomplished in two or three weeks?"

McGranery said he has had the antiracketeering drive in mind for two or three years.

"I believe if you want to destroy a thing," he said, "you must pull it out by the roots."

Newsmen questioned McGranery at length about his previously announced plan to hold up the reentry to this country of British-born movie actor Charlie Chaplin, who is now in England.

McGranery vigorously recited "charges" which he said have been made against Chaplin, and said, "I have directed that he be examined and interrogated and qualify as though on an original entry."

"Mr. Chaplin has been here for some 40-odd years," he said, "Mr. Chaplin has enjoyed the hospitality and all the opportunities of this country," he said, although Chaplin is not a citizen.

"They have charged Mr. Chaplin, Number 1, . . . with being a member of the Communist Party," said McGranery.

"Who has charged him?" one reporter asked.

"Well, you read the papers," answered McGranery.

"He has also been charged," said McGranery, "with grave moral charges. He has also been charged with making statements which indicate a leering, sneering attitude toward a country whose gracious hospitality has enriched him.

"No harm can come from a fair hearing," said the Attorney General.

McGranery said he has been thinking about the Chaplin case since he read of his "sneering responses" in connection with "his invitation to attend a show for the benefit of some children's thing out there on the West Coast."

The Attorney General said he was concerned about "men so highly publicised" who "show such an utter contemptible regard for the high estate of womanhood."

"If what has been said is true," said McGranery, "he is in my judgment an unsavory character."

Alfred P. Polizzi, arrested at Miami. A native Sicilian, who was naturalized in Cleveland in 1928, Polizzi was said to have been a prohibition era bootlegger and later a gambling operator at Cleveland and Newport, Ky. His police record dates back to 1920.

Anthony Volpe, taken into custody at Miami. It is alleged that he was a bodyguard and "executioner" for Al C[illegible]one. In recent years he was said to have been conducting extensive bookmaking operations in Chicago.

Deportation proceedings were announced against the following:

Harry Ozias Voiler, a native of Rumania, arrested at Miami. His police record goes back to 1918. He served a robbery sentence in the Michigan State Penitentiary, officials said.

William Lias, Wheeling (W. Va.) race-track man and gambling figure, who has been fighting the Government over alleged income tax evasion.

Mr. McGranery made plain that in attempting to denaturalize the accused persons, some basis for fraud in making their citizenship applications must be discovered. He implied that the Justice Department and Immigration officials had been carefully combing the records to avoid mistakes.

Discussing the Chaplin case, the Attorney General said that the actor had been in the United States forty-one years, "enjoying the hospitality and all the opportunities of this country," without becoming a citizen. He added that he had reasons for directing that the actor "be questioned on his original entry" when he returned to the United States.

Breaking Faith Is Denied

"His lawyer said we broke faith concerning his re-entry permit, but such a permit is merely identification," Mr. McGranery asserted. He stressed that a re-entry permit did not necessarily assure automatic new admission to this country.

"No harm can come from a fair hearing for Chaplin," he said. "If he can meet the standards, he will be admitted."

Long before entering the Cabinet, Mr. McGranery added, he had heard criticisms of Mr. Chaplin. One instance he cited concerned an invitation "for a children's affair on the West Coast."

Mr. Chaplin, the Attorney General declared, was said to have spoken "with contemptible regard for the high estate of womanhood," and "if what has been said is true, he is an unsavory character."

Bomb Found in Tokyo Embassy

TOKYO, Oct. 2 (AP)—A small, home-made fire or stench bomb was found inside the United States Embassy compound this morning. But an embassy official said it was "certainly not" explosive or lethal.

APPENDIX

Press Reports and Press "Releases"

"For Immediate Release
Friday, April 3, 1953

"DEPARTMENT OF JUSTICE

"Attorney General Herbert Brownell, Jr., announced today that the Board of Immigration Appeals has sustained the order of the Immigration and Naturalization Service to deport Joseph Accardi, 43, of Newark, New Jersey. The order charges that he entered the United States at Buffalo, New York, August 19, 1932, without the required immigration visa.

"Accardi, known as a New Jersey racketeer, is a native of Sicily, Italy, and brother of Samuel Accardi against whom denaturalization proceedings are pending in the Federal Court at Newark."

"For Release to Morning Papers of
Wednesday, May 26, 1953

"ADDRESS
By
HONORABLE HERBERT BROWNELL, JR.,
Attorney General of the United States.

". . . . .

"But here are a few examples of the thousands of decisions and actions the Department of Justice may be called to make and take in a single day: . . . to initiate deportation proceedings against undesirables like Joseph Accardi. . . ."

"ORGANIZED CRIME
"ITS THREAT TO BUSINESS AND GOVERNMENT

"Address
"By
"WARREN OLNEY III
"Assistant Attorney General of the United States

"Friday, October 30, 1953.

"The second area is one in which the Department of Justice has not only primary but exclusive jurisdiction—the field of denaturalizing and deporting gangsters and racketeers, who are foreign-born and who, because of their criminal activities, can make no claim to remain in the United States while violating its laws. . . .

"To name but a few of the nationally known hoodlums who are the objects of the program—Spinella from Florida and De Simone

from Missouri have been deported—Nicolo Impostato of Kansas City, Jack Dragna of Los Angeles, Joe Accardi of New York and Joe Adonis of New York have all been ordered deported. . . ."

"For Immediate Release
"Friday, May 8, 1953

"DEPARTMENT OF JUSTICE

"Attorney General Herbert Brownell, Jr. announced today that a petition seeking cancellation of the naturalization of Gaetano Martino, Brooklyn, New York, has been filed in the U. S. District Court of Brooklyn.

"The move was another step in the *program for denaturalization* and/or *deportation of racketeers and others who have engaged* in *criminal activities.*"

CLARK, Chief Judge (concurring in the result).

I concur in the result reached in the majority opinion, but do not feel it necessary to explore, as it does, the underlying motivation of the Board members. What the Supreme Court required the relator to prove he has now adequately demonstrated; namely, that there was a list as alleged, that he was on it, and that this fact was known to the Board. I do not believe that the Supreme Court required us to go beyond this to speculate about the effect of this knowledge on the exercise of the Board's discretion. That would surely be a vain task; all judges naturally and honestly believe that they are above bias. But the facts shown create a presumption of bias not overcome by the Board's self-serving declaration to the contrary. This would be so, whether the program was one of expedition or one of deportation, for in either case relator was being singled out as an alien whose imminent departure was deemed desirable by the Attorney General.

What, then, should be the proper disposition of this case? The Supreme Court advised thus: "If petitioner can prove the allegation, he should receive a new hearing before the Board without the burden of previous proscription by the list. After the recall or cancellation of the list, the Board must rule out any consideration thereof and in arriving at its decision exercise its own independent discretion, after a fair hearing, which is nothing more than what the regulations accord petitioner as a right." 347 U. S. 260, 268. I am not convinced that the Attorney General's instructions of April 23, 1954, constituted a withdrawal of the list. Since we cannot effectively control the Attorney General in the administration of his office, we can require only that at a new hearing relator should at least have the opportunity to present evidence rebutting the Attorney General's characterization of him as a racketeer.

LAN, Circuit Judge (dissenting):

am unable to agree with the result reached by my brethren in case. I read the majority opinion in the Supreme Court as ing that the issue on which the relator was entitled to a hear- before the Court was whether the Board's denial of discre- ary relief represented its own untrammelled decision or one ated by the Attorney General. Mr. Justice Clark said: "It is rtant to emphasize that we are not here reviewing the *manner* hich discretion was exercised. * * * Rather, we object to the rd's alleged *failure to exercise* its own discretion * * * (Italics riginal). The language in the preceding paragraph of Justice k's opinion means no more, I think, than that the relator's gations sufficiently charged "dictation" by the Attorney General, not that the acts alleged, if proved, necessarily resulted in ation.

he relator has had his hearing on this issue and the trial Judge found that the Board members "reached their individual and ctive decision on the merits, free from any dictation or sugges- by the Attorney General or any of his assistants or anyone acting or purporting to act for him." That finding is sup- ed by the sworn and unequivocal testimony of the Board mem- who sat on Accardi's case—the Chairman testifying in person the others by deposition—and I cannot regard the finding clearly erroneous." Nor can I agree with Judge Clark who s, as I understand his concurring opinion, that we may accept finding but side-step its effect. Such a result can be achieved by giving the Supreme Court's opinion an interpretation which not think it will bear.

n my view, the dismissal of the writ should be sustained.

N UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NITED STATES EX REL. JOSEPH ACCARDI, RELATOR-APPELLANT,

v.

AND J. SHAUGHNESSY, District Director of Immigration & Naturalization, etc., RESPONDENT-APPELLEE.

JUDGMENT—January 7, 1955

eal from the United States District Court for the Southern District of New York

his cause came on to be heard on the transcript of record from United States District Court for the Southern District of New k, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and action remanded in accordance with the opinion of this Court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

(S.) A. DANIEL FUSARO,
Clerk.

[File endorsement omitted]

Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 616

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service, etc., PETITIONER,

vs.

UNITED STATES EX REL. JOSEPH ACCARDI

ORDER ALLOWING CERTIORARI—Filed March 14, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar and assigned for argument immediately following No. 145.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. —

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK DISTRICT, DEPARTMENT OF JUSTICE, PETITIONER

v.

UNITED STATES EX REL. JOSEPH ACCARDI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of Edward J. Shaughnessy, as District Director of the Immigration and Naturalization Service for the New York District, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit reversing the order of the District Court for the Southern District of New York dismissing respondent's petition for habeas corpus.

OPINIONS BELOW

The opinions in the court of appeals (App. 1a-21a) have not yet been reported. The findings and

conclusions of the district court appear at pages 188-190 of the record.

The prior opinion of this Court in this cause is reported at 347 U.S. 260.

JURISDICTION

The judgment of the court of appeals was entered January 7, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, upon the unchallenged testimony of members of the Board of Immigration Appeals that they understood that the inclusion of respondent in the Attorney General's program for deporting undesirable aliens meant only that they were to give priority to his case, the court below properly applied this Court's decision in *Accardi* v. *Shaughnessy*, 347 U.S. 260, in presuming that the mere existence of such a program prevented the Board from exercising its independent discretion on respondent's application for suspension of deportation.

STATEMENT

In its prior opinion in this cause, *Accardi* v. *Shaughnessy*, 347 U.S. 260, this Court ruled that respondent's allegation, in his petition for habeas corpus seeking review of an order of deportation, that the denial of his application for suspension of deportation by the Board of Immigration Appeals had been caused by the prejudgment of his case by the Attorney General, who previously and publicly had described him as an undesirable alien,

raised an issue of fact which required a hearing. The Court pointed out that "proof was offered and refused that the Commissioner of Immigration told previous counsel of petitioner, 'We can't do a thing in your case because the Attorney General has his [respondent's] name on that list of a hundred' " (347 U.S. at 267). The Court, after noting that the petition for habeas corpus charged the Attorney General with dictating the decision of the Board, and that the offer was to prove such fact, 347 U.S. at 267, said, at page 268:

> It is important to emphasize that we are not here reviewing and reversing the *manner* in which discretion was exercised. * * * Rather, we object to the Board's alleged *failure to exercise* its own discretion, contrary to existing valid regulations.
>
> If petitioner can prove the allegation, he should receive a new hearing before the Board without the burden of previous proscription by the list. After the recall or cancellation of the list, the Board must rule out any consideration thereof and in arriving at its decision exercise its own independent discretion, after a fair hearing, which is nothing more than what the regulations accord petitioner as a right. Of course, he may be unable to prove his allegation before the District Court; but he is entitled to the opportunity to try. If successful, he may still fail to convince the Board or the Attorney General, in the exercise of their discretion, that he is entitled to sus-

After the Supreme Court remanded, pursuant to its opinion in Accardi v. Shaughnessy, 347 U.S. 260, the case went to trial, on a new petition for a writ of habeas corpus before a judge (without a jury). The judge made an order dismissing the writ. From that order relator appeals.

FRANK, *Circuit Judge:*

1. We shall assume familiarity with the facts stated in our previous opinion, 206 F. (2d) 897, and in the opinion of the Supreme Court, 347 U.S. 260. We do stress one fact: The particular kind of discretionary relief sought by Accardi was suspension of deportation, pursuant to Section 19(c) of the Immigration Act of 1917, as amended in 1948, which, so far as pertinent, provides:

> "In the case of any alien (other than one to whom subsection (d) of this section is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may . . . suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more, and is residing in the United States upon July 1, 1948." 8 U.S.C. (1946 ed. Supp. V) Sec. 155(c).

> pension, but at least he will have been afforded that due process required by the regulations in such proceedings [emphasis in original].

Following the decision by this Court, the district court issued a writ of habeas corpus on May 10, 1954 (R. 8-9). After the filing of a return to the writ, supplemented by affidavits, a traverse, interrogatories and responses thereto (R. 10-55), District Judge McGohey held a hearing on June 23, 1954 (R. 84), at which relator attempted to prove his allegations. The oral testimony at this hearing (R. 84-133) was supplemented by a pretrial deposition of former Attorney General McGranery (R. 134-145) and post-trial depositions of members of the Board of Immigration Appeals (R. 56-72) and Mr. Horan, a Special Assistant to the Attorney General (R. 73-83). The pertinent evidence adduced may be summarized as follows:

After former Attorney General McGranery held a conference with F.B.I. Director Hoover in which he asked for the names of racketeers and undesirables who had obtained their citizenship through fraud or were subject to deportation, he called a meeting of officials of the Department of Justice, and a Mr. Donegan was placed in charge of coordinating the investigation and preparation of charges in these deportation matters (R. 138-139). Recommendations for adding names to the Attorney General's deportation program could come from the Immigration and Naturalization Service, the F.B.I., the Criminal Division, or the Deputy Attorney General's office (R. 75). These units

2. Printed in the Appendix to this opinion are certain public announcements of the Attorney General, consisting of newspaper reports of interviews with him and of "press releases" issued by him. They were not called to our attention on the previous appeal. But they were submitted by the government to the Supreme Court. Apparently the Supreme Court took judicial notice of them, since it referred to and relied upon them in its opinion. These data were received in evidence at the subsequent trial and are now in the record before us. They are significant because of the following portions of the Supreme Court's opinion:

> "We think the petition for habeas corpus charges the Attorney General with precisely what the regulations forbid him to do: dictating the Board's decision. The petition alleges that the Attorney General included the name of petitioner in a confidential list of 'unsavory characters' whom he wanted deported; public announcements clearly reveal that the Attorney General did not regard the listing as a mere preliminary to investigation and deportation; to the contrary, those listed were persons whom the Attorney General 'planned to deport.' And, it is alleged, this intention was made quite clear to the Board when the list was circulated among its members. In fact, the Assistant District Attorney characterized it as the 'Attorney General's proscribed list of alien deportees.' To be sure, the petition does not allege that the 'Attorney

were represented on the Coordinating Committee of which Mr. Donegan was chairman and Mr. Horan, his assistant (R. 76).

Mr. McGranery stated that his program was "deporting and ridding the nation of undesirable aliens engaged in racketeering and other criminal activities" (R. 136-137). He explained that there was no static list of potential deportees, but that the list was constantly changing from day to day as the records were studied (R. 135-136).

Upon the recommendation of the Immigration and Naturalization Service, relator's name was placed on the list on November 19 or 20, 1952 (R. 74, 77-79, 81-82). Mr. McGranery stated that an F.B.I. report and his own investigation indicated that relator was a racketeer, and that was the reason he took steps to deport him (R. 141).

Thomas G. Finucane, chairman of the Board of Immigration Appeals at the time relator's case was before it, testified as follows:

He first became aware of the Attorney General's program, as announced in the official press release of the Department of Justice on October 2, 1952 (R. 148-149), by reading of it in the newspapers and then receiving a copy of the press release (R. 103-104). He probably circulated this press release among the other Board members as the normal practice, although he had no specific recollection on this (R. 104-105).

About two or three months after the announcement, Mr. Rawitz of the Immigration Service asked whether the Board could expedite the consideration of cases under the program. Mr. Finucane

> General ordered the Board to deny discretionary relief to the listed aliens.' It would be naive to expect such a heavy-handed way of doing things. . . . If petitioner can prove the allegation, he should receive a new hearing before the Board without the burden of previous proscription by the list. After the recall or cancellation of the list, the Board must rule out any consideration thereof and in arriving at its decision exercise its own independent discretion, after a fair hearing, which is nothing more than what the regulations accord petitioner as a right."

3. The government contends that, reasonably construed, those published utterances of the Attorney General could mean no more than that the hearings of persons included in his "program" should be "expedited." The government, explicitly and repeatedly, advanced that same contention in its brief in the Supreme Court.[1] It seems obvious that the Supreme Court rejected it.

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[1] The following are excerpts from that brief:

Petitioner's "case rests entirely upon the fact that officials of the Department of Justice have (1) performed their duty to bring deportation proceedings against aliens residing here illegally, (2) *expedited cases* of aliens deemed to be particularly undesirable, (3) believed petitioner to belong to this class, and (4) made public statements describing these activities. . . ."

"There is nothing extraordinary, therefore, in the fact that efforts should be made by the Department of Justice to *expedite proceedings* against deportable aliens whose presence here is deemed particularly undesirable. Nor is it surprising that *public statements* . . . should be made *describing these efforts.*"

Other similar cases "were *expedited* under the Attorney

stated that the Board would do so. (R. 107.) The procedure adopted was for Rawitz to give the Board's calendar clerk a written memorandum showing the names of cases within the program, but in some instances oral communications may have been received. There was no written communication to the Board to expedite the hearing of relator's case, and Mr. Finucane and other Board members did not recall any oral request for this. (R. 109-110.) Mr. Finucane did not understand the program to be one for intensifying efforts looking toward deportation and denaturalization of subversives and racketeers, but rather to intensify efforts in the prosecution of such cases (R. 111). Neither Mr. Donegan nor Mr. Horan of the Department of Justice ever called Mr. Finucane regarding the program (R. 111-112).

Mr. Finucane testified that when relator's case was decided, no press release or order of the Attorney General was before the Board members or discussed by them, and that their decision was "free and undictated" (R. 113-114). He stated that the Board members did not receive any instructions from the Attorney General or any of his subordinates as to how relator's case should be decided on its merits (R. 126). At the time of the Board's decision on April 3, 1953, Mr. Finucane was not even aware that relator's name was on the list, since there was no written communication to the Board so stating, and he stated that none of the Board members had a recollection of this fact (R. 127, 128). No members of the Board or its staff had anything to do with the preparation of the De-

4. If more were needed as to the meaning of the Attorney General's statements and "releases," we now have the testimony of the then Attorney General, McGranery, which amply supports the Supreme Court's interpretation.[2] We must take it, then, that the Attorney General's clearly stated intention was to deport anyone named by the Attorney General as within his program.

General's program to insure enforcement of the deportation laws against aliens believed to be especially undesirable."

(The emphases in the above quotations are added.)

[2] The following are excerpts from his deposition testimony:

"Q. Were you the Attorney General of the United States on October 2, 1952? A. Yes.

"Q. Did you hold a press conference in your office in Washington, D. C. on that date? A. I did.

"Q. Does the official press release of the Department of Justice contain the announcement which you made on that date? A. A copy of the release is here, and it does.

"Q. Do the news items of October 3, 1952 in the Washington Star, The Washington Post and the New York Times, accurately reflect your statements to the press? A. They do. . . .

"Q. When Jack Ignatius Dragna was arrested for deportation on December 8, 1952, the official press release of that day by the Department of Justice said:

> " 'The arrest, . . ., was another step in his denaturalization and deportation program deemed at ridding the nation of undesirable aliens engaged in racketeering and other criminal activities.'

A. You can underline that 'undesirable aliens.'

"Q. Did the aforesaid quotation accurately reflect your program? A. That is right. That reflects accurately my program. . . .

"Q. At the time your press conference, according to the newspaper accounts, you had included within your program such persons as Frank Costello, Nicholas Circella, William Lias, Hyman Shomberg, Alfred Polizzi, Harry Voiler and Anthony Volpe. The Government had admitted that Joseph Accardi was within your program. Do you recall whether

partment of Justice press release on April 3, 1953 (App. 16a), the same date as the Board's decision (R. 114-115, 149-150).

In the collective deposition of the other four Board members, they testified that at no time did they receive any communication relative to relator's case from the Attorney General or any of his subordinates as to how the case should be decided on its merits (R. 70). In response to the question as to whether on the date of the Board's decision the members knew whether relator's case was within the Attorney General's program, one said that he had no such knowledge; the second, that he may have known but could not say; the third, that although he could not say with definiteness, it was his opinion that he knew relator was on the list; and the fourth, that she had no recollection that she knew relator was on the list (R. 69). The Board members testified that, even if they had known that relator's name was included in the program, this would not have influenced their decision on the merits and they would not have construed this as dictation by the Attorney General for an adverse decision (R. 72). The Board members did not construe any press release by the Attorney General relative to an alien whose case was pending before them in 1952 or 1953 as an indirect suggestion or hint from the Attorney General that they should decide the case against the alien, apart from the contents of the record (R. 71).

Testimony in the deposition of former Attorney General McGranery was to the effect that the Board never received a list of the persons on his

program, but received the material furnished to it in individual cases. He denied ever indicating to the Board, either directly or indirectly, his feelings as to how its members should determine a case pending before it. (R. 142-143.)

No proof was offered in support of respondent's earlier contention, noted by this Court (*supra*, p. 3), that the Commissioner of Immigration had told his attorney that "We can't do a thing in your case because the Attorney General has his [respondent's] name on that list of a hundred."

The District Court, in dismissing the writ of habeas corpus, held that relator had failed to prove his charge (R. 187-190). Pertinent findings by the District Court are set out in the margin.[1]

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[1] "3. When an appeal by any alien of either of the classes described reached the Board of Immigration Appeals, the Chairman of that Board was notified either orally or in writing that such alien was one of those embraced in the Attorney General's program. This notification was sometimes passed on to other Board members, sometimes not. The purpose of the notification, and it was so understood by the Board, was merely to indicate that the Attorney General desired expeditious consideration and determination of the appeal.

"4. Neither such notification nor the existence of the program was considered by the Chairman or by any Board member as a direction by the Attorney General, or even as a hint by him, to decide an appeal adversely to an alien. Moreover, these matters were given no weight by the Board in their deliberations.

* * * * *

"7. The Board members and each of them who considered [relator's] appeal reached their individual and collective decision on the merits, free from any dictation or suggestion by the Attorney General or any of his assistants or anyone else acting or purporting to act for him.

"8. The Board's adverse decision on [relator's] appeal is adequately supported by the evidence before the Board. * * *

On appeal, the judgment was reversed and remanded by the Court of Appeals for the Second Circuit, Judge Harlan, dissenting (App. 20a). Judge Frank of the majority read this Court's prior opinion as holding that respondent was entitled to a new hearing if he could prove that he was one of the persons to whom the Attorney General's statements and press releases referred, that a majority of the Board knew that fact, and that they were affected by it when they denied him discretionary relief (App. 6a). Accepting as a fact that the Board members consciously believed, when they testified, that the Attorney General's statements amounted to no more than a direction to give priority to a case on the program, he found it impossible to believe that, in determining respondent's application for discretionary relief, they were not unconsciously influenced by their knowledge that his name was included in the program (App. 8a). Accordingly, he ruled that respondent was entitled to be discharged unless accorded a new hearing before the Board under the new instructions issued by the present Attorney General on April 23, 1954, after this Court's prior decision in the case (App. 14a-15a).[2]

"* * * I find no rational basis for disbelieving the witness, and relator's inferences are clearly refuted by the testimony which is fully accepted." (R. 189, 190.)

[2] These instructions, issued shortly after this Court's decision in *Accardi* v. *Shaughnessy*, 347 U. S. 260, stated in effect that the Board of Immigration Appeals should exercise its independent judgment and discretion in making its decisions, without prejudgment and without being influenced by the Attorney General's program. (R. 17-18.)

Judge Clark, concurring, was of the view that it was unnecessary to speculate about the effect of the Board's knowledge of the list on the exercise of its discretion; that the prior opinion of this Court merely required respondent to prove, as he had, that there was a list, that his name was on it, and that such fact was known to the Board (App. 18a-19a). He concluded that such facts "create a presumption of bias not overcome by the Board's self-serving declaration to the contrary. This would be so, whether the program was one of expedition or one of deportation, for in either case relator was being singled out as an alien whose imminent departure was deemed desirable by the Attorney General." He also expressed doubt as to whether the Attorney General's instructions of April 1954 constituted a withdrawal of the list (App. 19a). Judge Harlan, dissenting, thought this Court had held that the issue on remand was "whether the Board's denial of discretionary relief represented its own untrammelled decision or one dictated by the Attorney General"; that the trial judge's finding that the Board members reached their decision "free from any dictation or suggestion by the Attorney General" or anyone acting for him was not clearly erroneous, and hence that the order of the District Court should be sustained (App. 20a 21a).

REASONS FOR GRANTING THE WRIT

The question involved in this case is whether, despite the unchallenged testimony of the members

of the Board of Immigration Appeals that the inclusion of Accardi in the Attorney General's program for deporting undesirable aliens meant only that the Board should expedite his deportation proceeding, the existence of such a program supports a presumption of bias in the Board. This question is already before this Court in *Marcello* v. *Bonds*, No. 145, this Term, since Marcello was also included in the Attorney General's program and he contends that that fact alone establishes that the Board did not exercise independent discretion in his case. We submit that the decision below erroneously applied this Court's decision in *Accardi* v. *Shaughnessy*, 347 U.S. 260, and should be reviewed by this Court, along with the *Marcello* case, so as to make clear the proper disposition of a substantial number of deportation cases.

1. We interpret the decision of this Court in *Accardi* v. *Shaughnessy, supra*, as did Judge Harlan dissenting in the court below, as holding that Accardi was entitled to a rehearing before the Board of Immigration Appeals if he could prove, not only that he was included in the Attorney General's deportation program and that the Board was aware of that fact, but also that these circumstances prevented the Board from exercising its independent discretion in determining Accardi's application for suspension of deportation. Notwithstanding unchallenged testimony in the District Court, following this Court's decision, that the members of the Board understood that the inclusion of Accardi in the program meant only that

the Board should expedite or give priority to the determination of his and other program cases, the majority of the court below have held that there is a conclusive presumption that the existence of such expediting instructions created in the Board a conscious or unconscious bias which prevented it from exercising independent discretion on his application. We submit that this unprecedented presumption of bias on the part of administrative officers is clearly erroneous, as a matter of law, in view of the Attorney General's exclusive discretion to determine the order in which deportation cases shall be heard. Cf. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145-146. That is, we contend that an instruction by the Attorney General to the Board to expedite and give priority to a particular class of cases cannot support a presumption that the Board is therefore disabled by bias from making independent decisions on the merits of such cases.

2. Prior to this Court's decision in *Accardi* v. *Shaughnessy, supra,* the Board of Immigration Appeals had heard and decided about 40 cases included in the Attorney General's deportation program. *Marcello* v. *Bonds,* No. 145, this Term, typifies these cases in that it is alleged, without denial, that Marcello was included in the Attorney General's deportation program. Marcello, in the brief filed on his behalf by the same counsel who represents the respondent here, argued that such fact alone established bias. The government argued in opposition to the granting of certiorari in

Marcello that his mere inclusion in the program did not establish prejudicial influence upon the Board and that he had made no offer to prove his allegations of such influence. Realistically, we must assume that upon a hearing, such as was held in *Accardi* upon remand, it would also appear that the Board was aware that Marcello was included in the program and that the Board understood this to mean that it should give priority to his case. Indeed, we believe that these circumstances could be shown in every case included in the Attorney General's program and decided by the Board before this Court's decision in *Accardi*.

On April 23, 1954, following this Court's *Accardi* decision, the Attorney General issued instructions to the effect that the Board of Immigration Appeals (and special inquiry officers of the Immigration and Naturalization Service) should exercise an independent judgment and discretion in deportation cases without regard to the existence of the deportation program. Since these instructions simply confirm the testimony of the Board members in *Accardi* upon remand, the decision below throws doubt upon the validity of the decisions of the Board in a substantial number of additional cases decided under these instructions.

Thus, the proper construction of this Court's decision in *Accardi* v. *Shaughnessy, supra,* is of general and immediate importance. Moreover, the difference of views in the court below, even among the judges who make up the majority, in itself establishes the need for further clarification. For the

and he grounded his decision primarily on tha finding, saying that he could see "no rationa ground for disbelieving the witnesses" on tha score.

This finding, based on that testimony, canno stand up. We accept it as a fact that the Boar members *consciously* believed, when they testifie that the Attorney General's statements amounte to no more than a calendar order (i.e., a directio to give preference, merely in point of time, to con sideration and decision of such cases), and tha beyond that, those statements did not have any ef fect on the Board's decisions. But it is incredible human nature being what it normally is, that th Attorney General's statements—as interpreted b the Supreme Court and the former Attorney Gen eral—did not *unconsciously* influence the Boar members so that they felt obliged not to exercis their discretion and, without doing so, to decid against Accardi. Any other finding involves re liance on so remarkable a degree of improbabilit as to be untenable.

Yet the rejection of the finding does not impl any challenge of the intelligence of integrity o

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man or by any Board member as a direction by the At torney General, or even as a hint by him, to decide a appeal adversely to an alien. Moreover, these matter were given no weight by the Board in their deliberations . . . The Board members, and each of them who consid ered Accardi's appeal, reached their individual and col lective decision on the merits, free from any dictation o suggestion by the Attorney General or any of his assist ants or anyone else acting or purporting to act for him.

majority below is not in accord as to whether the new hearing which they have ordered may proceed under the directions of the present Attorney General issued April 23, 1954.

3. While *Marcello* v. *Bonds* presents the issue as to the precise requirements of this Court's *Accardi* decision, we believe that it is desirable from every point of view to clarify the legal significance of the Attorney General's program in the light of the present record in *Accardi*, rather than in *Marcello* alone. The instant case is the one in which the facts as to the operation of the program are fully developed by sworn testimony, so that a decision can be based on facts and not on speculation. It is manifest that the facts developed as to the understanding of the program by the members of the Board of Immigration Appeals are not peculiar to this case, but affect every case on the program. A decision by this Court in the instant *Accardi* case will therefore be authorative as to all cases on the program, in a way in which a ruling on the bare allegations in *Marcello* cannot be, and probably will also control the disposition of *Marcello*.

the Board members. One need not turn to the works of Freud and his disciples to learn that unconscious influences importantly affect the memory of honest men; such teachings will be found in the writings of Plato, Aristotle, Euripides, Dante, Montaigne, Shakespeare, Moliere, Pascal, Pope, Byron, Dr. Oliver Wendell Holmes and his sagacious son, to say nothing of novels since Fielding to the present. Indeed, the courts have long recognized that, stimulated by interest, pride or other motives, thoroughly honest and intelligent witnesses may tell unbelievable stories. The books are full of comments like these: "No class of men know better than judges, how much interest may unconsciously warp an honest mind."[46] "Our memories are easy and ofttimes unconscious slaves to our wills."[46] Accordingly, a court may discredit the testimony of a witness "without casting any shade of doubt upon his character."[47] "The statements of some are unconsciously affected by their wishes, hopes or prejudices."[48] Judges have spoken of the "ease with which honest witnesses can persuade themselves that they remember some bygone circumstance which they are ingeniously induced to think that they remember";[49] of "how extremely prone persons are to believe what they wish."[47] Be-

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[46] Grant v. Bradstreet, 87 Me. 583, 609, 33 Atl. 165, 173.
[46] Thomas v. Ribble, 24 S.E. 241, 245.
[47] Fisler v. Porch, 10 N.J. Eq. 243, 245.
[48] United States v. Flint, 25 Fed. Cas. No 15,121 (at p. 1111).
[49] Hershey v. Blacksley, 33 Fed. 922, 924.
[47] Crouch v. Hooper, 16 Beav. 182, 185.

CONCLUSION

It is therefore respectfully urged that this petition for a writ of certiorari should be granted and that the cause be set down for argument together with *Marcello* v. *Bonds*, No. 145.[3]

SIMON E. SOBELOFF,
Solicitor General.

FEBRUARY, 1955.

[3] Counsel for respondent, who is also counsel for *Marcello*, has agreed to cooperate in having the case set for argument during this term of court by taking less than full time to answer this petition. If certiorari is granted in this case, the government undertakes to file its brief within a short time after the date of grant, thus giving counsel for respondent his full thirty days to reply and still making it possible for argument to be heard at the April 18 session of this Court.

cause of interest, "very honest persons (such is the infirmity of our nature) often deceive themselves without being aware of it"; they "will often give false color to a transaction, without . . . intending to speak falsely or to suppress the truth."[40] The judiciary has thus acknowledged the wisdom of the aphorism: "Memory says, 'I did this'; pride says, 'I could not have done it'; eventually pride wins."

The courts, too, have often held that a highly improbable story requires "strong corroboration,"[40a] and that "inherently improbable" testimony, not adequately explained, should be disregarded.[41] "The circumstances of a case may be such as to make" evidence "utterly incredible, although there are confident attestations in support of it," said Lord Stowell.[42] A court, remarked Judge Learned Hand, is not obliged to close its eyes "and assume a credulity which no sensible man can . . ."[43] Evidence, as to human conduct, con-

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[40] Marsh v. Tyrell, 4 Eng. Ecc. 33, 46.

See also Vreeland v. Vreeland, 48 N.J. Eq. 56, 21 Atl. 627, 630; Rogers v. Rogers, 97 Md. 573, 55 Atl. 450, 456; Thayer v. Hart, 20 Fed. 693; Hunter v. Wetsell, 84 N.Y. 549, 556.

[40a] Moore, Facts, (1898) §§ 93, 1146; Smith et al. v. Davis, C.C. 34 F. 783, 784; cf. The William Gray, 29 Fed. Cas. 1300, 1302.

[41] Quock Ting v. United States, 140 U.S. 417, 420, 11 S. Ct. 733; Gindorff v. Prince, 189 F. (2d) 897 (C.A. 2); The Dauntless, 9 Cir., 129 F. 715, 721; Fire Association v. Weathered, 5 Cir., 54 F. (2d) 779; Emanuel v. Kansas City T. & Tr. Co., 8 Cir., 127 F.(2d) 175, 180; Moore, loc.cit. §137.

[42] The Argo, 1 C. Rob. 158, 159, quoted in Moore, loc.cit. §140.

[43] Ramopa Company v. A. Gustun & Co., S.D. D.C. 278 F. 557, 559.

trary to common experience, will not be accepted.[45] The "eye of the law" will not "be blinded" by incredible statements,[46] statements "beyond the pale of credibility."[47] "The measure of proof required to establish any proposition must necessarily vary with its degree of probability,"[48] and must be strong in proportion to the degree of improbability.[49]

Pertinent here is the following: (1) In its opinion, issued on April 3, 1953, the Board said:

> "Affidavits of persons well acquainted with the alien, character investigations by the Service and the testimony of four witnesses placed

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[45] Gardner v. Gardner, 2 A.C. 723, 730, 736; Earle v. Norfolk, etc. Hosiery Co., 36 N.J. Eq. 188, 194; New York & Brooklyn Ferry Co. v. Moore, 102 N.Y. 667, 6 N.E. 293, 298; Vreeland v. Vreeland, 48 N.J. Eq. 56, 21 Atl. 627, 631; Whelen v. Osgoodby, 62 N.J. Eq. 571, 50 Atl. 692, 694; Gardner v. Weston, 18 Ia. 533, 535; Hunter v. N.Y.O. & W. R. Co., 116 N.Y. 615, 23 N.E. 9, 6 L.R.A. 246; Gurley v. Missouri Pac. R. Co., 104 Mo. 211, 16 S.W. 11, 17; Groth v. Thomann, 110 Wis. 488, 86 N.W. 178, 181.

[46] Hook v. Missouri Pacific Ry. Co., 62 Mo. 659, 63 S. W. 360, 362.

[47] Vramme v. The Ship New England, 14 Fed. Cas. 7,930, p. 852.

[48] Haworth v. Stark, C.C., 88 F. 512, 514.

[49] Murray v. White, D.C. 9 F. 562, 564; The Gratitude v. The Eutaw, D.C. 14 F. 479, 481; The El Dorado, D.C. 27 F. 762, 763; Smith et al. v. Davis, C.C., 34 F. 783, 787; Merritt & Chapman D. &. W. Co. v. North German Lloyd, D.C. 120 F. 17, 27; Morison v. Dominion National Bank, 169 Va. 191, 192 S.E. 707, 711; Moore, loc.cit. §32.

Those more impressed by Latin than English or American, are referred to the maxim, "In obscuris inspici solere quod verisimilius est, aut quod plerumque fieri solet."

APPENDIX

in this proceeding establish that the alien is considered a person of good moral character."

In a "press release" issued that same day, the Attorney General announced

"that the Board of Immigration Appeals has sustained the order of the Immigration and Naturalization Service to deport Joseph Accardi, 43, of Newark, New Jersey. The order charges that he entered the United States at Buffalo, New York, August 19, 1932, without the required immigration visa.

"Accardi, known as a New Jersey racketeer, is a native of Sicily, Italy, and brother of Samuel Accardi against whom denaturalization proceedings are pending in the Federal court at Newark. . . .

"These actions were taken under the current denaturalization and deportation program of Attorney General Brownell against top racketeers and subversives. They are the result of closely coordinated action and intensive investigation by the Federal Bureau of Investigation and the Immigration and Naturalization Service."

We have in mind, too, the Supreme Court's remarks that this Board is not an independent agency —like the Interstate Commerce Commission or the Securities and Exchange Commission—but a "nonstatutory board composed of subordinates within a department headed by the individual who for-

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 97

OCTOBER TERM, 1954

Argued November 8, 1954; Decided January 7, 1955

Docket No. 23191

UNITED STATES OF AMERICA, EX REL. JOSEPH ACCARDI, REALTOR-APPELLANT

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK DISTRICT, DEPARTMENT OF JUSTICE, RESPONDENT-APPELLEE

Before: CLARK, Chief Judge, and FRANK and HARLAN, Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, dismissing a writ of habeas corpus, McGohey, Judge. REVERSED and REMANDED.

Jack Wasserman, Washington, D. C. (Irving Radar, of Counsel, New York, N.Y.) for relator-appellant

J. Edward Lumbard (Harold J. Raby and Lester Friedman, of counsel) for respondent-appellee.

mulated, announced, and circulated such views of the pending proceedings" and that it "would be naive to expect such a heavy-handed way of doing things" as an explicit order by the Attorney General to the Board to deny the discretionary relief of suspension of deportation to any alien designated by him.

We conclude, therefore, that the Board members, in deciding against Accardi's application for such discretionary relief—i.e., suspension of deportation—were controlled by what amounted to an order from their superior so to decide. The trial judge's finding is "clearly erroneous," since, "although there is evidence to support it," we "are left with the definite and firm conviction that a mistake has been made committed." United States v. U. S. Gypsum Co., 333 U.S. 364, 395; United States v. Oregon Medical Society, 343 U. S. 326, 339; McAllister v. United States, —— U. S. —— (November 8, 1954).

9. To round out the story, it should be noted that the government advances these arguments:

(a) The Attorney General, under the regulations, may reverse any Board decision; therefore, says the government, it is absurd to believe that he gave the Board orders directing how they were to decide any particular cases. The government made this same contention in its brief in the Supreme Court.[5] As this argument did not persuade that Court, we do not consider it.

---

[5] In its Supreme Court brief, the government said: "It would be a startling thing indeed . . . to suggest that the

5. We read the Supreme Court's opinion as holding this:

(a) The Attorney General's statements, reported in the press and in his press releases, "clearly reveal that the Attorney General did not regard the listing as a mere preliminary to investigation and deportation," but, "to the contrary," showed that "those listed were persons whom the Attorney General 'planned to deport.' "

(b) Accardi is entitled to a new hearing before the Board—of the kind described by the Supreme Court—if at a trial in the district court he can prove that

(1) he was one of the persons to whom the Attorney General thus referred, and

(2) a majority of the Board knew that fact, and

(3) the majority was affected by it when the Board denied him discretionary relief.

---

he was included before or after your announcement of October 2, 1952? A. Joseph Accardi's case was one of the earliest cases submitted, and his case was already on appeal at the time. I think now—if I am incorrect, you correct me—Joseph Accardi's case had been heard by the Hearing Commissioner before and prior to October 2, 1952.

"Q. That is correct. A. But my investigation and the record of Accardi proved him, to my satisfaction, to be racketeer. That is why I put him on there. . . .

"Q. Attorney General Brownell has stated in press releases that Joseph Accardi is a racketeer. Do you recall whether he was included within your program because you or your staff considered him to be a racketeer? A. He was one of the first. . . My investigation of Accardi indicated that he was a racketeer and that is the reason I moved to deport him."

6. The evidence leaves no doubt that Accardi was so named.

7. Was the Board informed of this fact? The trial judge so found, stating: "In accordance with the practice in such cases, notice was given to the Board that Accardi was an alien embraced within the Attorney General's program." He made this finding, despite the oral testimony of the Board's Chairman that, previous to the Board's decision, he had no such knowledge. As this finding has support in the deposition-testimony of one Board member, and as two other members, also testifying by deposition, said they could not remember whether or not they then had had such knowledge, we see no reason why we should not accept that finding.[3]

8. This leaves but one issue of fact: Was a majority of the Board members influenced by that knowledge? All the Board members testified they were not, because, they said, a notification from the Attorney General that any particular alien was within his "program" meant, to them, merely that the Attorney General desired an expeditious consideration and determination of that alien's case. The trial judge, on the basis of that testimony, found that such was the Board's understanding;[4]

---

[3] The Board consists of five members.

[4] His pertinent findings read as follows:

"The purpose of the notification, and it was so understood by the Board, was merely to indicate that the Attorney General desired expeditious consideration and determination of the appeal. Neither such notification nor the existence of the program was considered by the Chair-

(b) In several instances, says the government, the Board has granted discretionary relief to aliens whom the Attorney General had previously named as within the "program." This argument, also, the government made unpersuasively in its brief in the Supreme Court.[6] We may add that there is no evidence that, in those cases, the Attorney General had not withdrawn the names of those aliens from his "program before the Board decided in their favor." Moreover, the Board's chairman significantly testified at the trial that, in every instance where a final decision has been rendered in a case within the "program," the alien was ordered to leave the country voluntarily or to be deported, and that none of such persons was granted suspension of deportation.

10. The Attorney General, on April 23, 1954, a few days after the Supreme Court's decision came

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Attorney General found it necessary to dictate the Board's decision to spare himself the possible task of reversing a determination with which he disagreed. . . . The short answer again is that both functions—the prosecution of deportation cases and decision on applications for discretionary relief—have been entrusted to the Attorney General. The fact that he performed the first is no ground for launching an inquiry into his performance of the second."

[6] In its Supreme Court brief, the Government said: In some cases which were "expedited" under the Attorney General's program, the "Board of Immigration Appeals has affirmed orders granting" discretionary relief. "In other cases, following orders for deportation, the Board has ordered the proceedings reopened to consider further applications" for such relief. "These instances . . . illustrate that decisions in the Department of Justice to commence deportation proceedings are neither decisions in advance on deportability nor judgments in advance on the propriety of discretionary relief."

down, issued instructions that the Board should not be influenced in its decisions by his "program" but, in each case, should exercise independent judgment.

11. Accardi must be released from custody unless, within a reasonable time, the Board, under those new instructions, holds a new hearing and renders a new decision on his application for discretionary relief.[7] Although the Board has already found that he has a good moral character, he should have the opportunity at the new hearing to offer evidence that he is not and never has been a racketeer. For it may be that, in so characterizing Accardi, the Attorney General has confused him with someone else of the same name.

Reversed and remanded.

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[7] Cf. Mastrapasqua v. Shaughnessy, 180 F. (2d) 999, 1003-1004 (C.A. 2).

APPENDIX TO COURT'S OPINION

Press Reports and Press "Releases"

Appellant's exhibits Nos. 4, 5 and 6 (three newspaper clippings from the Washington Post, Washington Evening Star and New York Times) may be found in the record filed in the United States Court of Appeals on pages 161a, 163a and 165a of the Joint Appendix.

Press Reports and Press "Releases"

"For Immediate Release
Friday, April 3, 1953

"DEPARTMENT OF JUSTICE

"Attorney General Herbert Brownell, Jr., announced today that the Board of Immigration Appeals has sustained the order of the Immigration and Naturalization Service to deport Joseph Accardi, 43, of Newark, New Jersey. The order charges that he entered the United States at Buffalo, New York, August 19, 1932, without the required immigration visa.

"Accardi, known as a New Jersey racketeer, is a native of Sicily, Italy and brother of Samuel Accardi against whom denaturalization proceedings are pending in the Federal Court at Newark."

"For Release to Morning Papers of
Wednesday, May 20, 1953

"ADDRESS

By

HONORABLE HERBERT BROWNELL, JR.,
Attorney General of the United States.

". . . .

"But here are a few examples of the thousands of decisions and actions the Department of Justice may be called to make and take in a single day: . . . to initiate deportation proceedings against undesirables like Joseph Accardi. . . ."

Press Reports and Press "Releases"

"ORGANIZED CRIME
"ITS THREAT TO BUSINESS AND GOVERNMENT

"Address

"By

"WARREN OLNEY III

"Assistant Attorney General of the United States

. . . .

"Friday, October 30, 1953.

. . . .

"The second area is one in which the Department of Justice has not only primary but exclusive jurisdiction—the field of denaturalizing and deporting gangsters and racketeers, who are foreign-

born and who, because of their criminal activities, can make no claim to remain in the United States while violating its laws. . . .

"To name but a few of the nationally known hoodlums who are the objects of the program—Spinella from Florida and De Simone from Missouri have been deported—Nicolo Impostato of Kansas City, Jack Dragna of Los Angeles, Joe Accardi of New York and Joe Adonis of New York have all been ordered deported. . . ."

Press Reports and Press "Releases"

"For Immediate Release
"Friday, May 8, 1953

"DEPARTMENT OF JUSTICE

"Attorney General Herbert Brownell, Jr. announced today that a petition seeking cancellation of the naturalization of Gaetano Martino, Brooklyn, New York, has been filed in the U. S. District Court of Brooklyn.

"The move was another step in the *program for denaturalization* and/or *deportation of racketeers and others who have engaged in criminal activities.*"

CLARK, *Chief Judge* (concurring in the result).

I concur in the result reached in the majority opinion, but do not feel it necessary to explore, as it does, the underlying motivation of the Board members. What the Supreme Court required the

relator to prove he has now adequately demonstrated; namely, that there was a list as alleged, that he was on it, and that this fact was known to the Board. I do not believe that the Supreme Court required us to go beyond this to speculate about the effect of this knowledge on the exercise of the Board's discretion. That would surely be a vain task; all judges naturally and honestly believe that they are above bias. But the facts shown create a presumption of bias not overcome by the Board's self-serving declaration to the contrary. This would be so, whether the program was one of expedition or one of deportation, for in either case relator was being singled out as an alien whose imminent departure was deemed desirable by the Attorney General.

What, then, should be the proper disposition of this case? The Supreme Court advised thus: "If petitioner can prove the allegation, he should receive a new hearing before the Board without the burden of previous proscription by the list. After the recall or cancellation of the list, the Board must rule out any consideration thereof and in arriving at its decision exercise its own independent discretion, after a fair hearing, which is nothing more than what the regulations accord petitioner as a right." 347 U.S. 260, 268. I am not convinced that the Attorney General's instructions of April 23, 1954, constituted a withdrawal of the list. Since we cannot effectively control the Attorney General in the administration of his office, we can require only that at a new hearing relator should at

least have the opportunity to present evidence rebutting the Attorney General's characterization of him as a racketeer.

HARLAN, *Circuit Judge* (dissenting):

I am unable to agree with the result reached by my brethren in this case. I read the majority opinion in the Supreme Court as holding that the issue on which the relator was entitled to a hearing before the Court was whether the Board's denial of discretionary relief represented its own untrammelled decision or one dictated by the Attorney General. Mr. Justice Clark said: "It is important to emphasize that we are not here reviewing the *manner* in which discretion was exercised. * * * Rather, we object to the Board's alleged *failure to exercise* its own discretion * * * (Italics in original). The language in the preceding paragraph of Justice Clark's opinion means no more, I think, than that the relator's allegations sufficiently charged "dictation" by the Attorney General, and not that the acts alleged, if proved, necessarily resulted in dictation.

The relator has had his hearing on this issue and the trial Judge has found that the Board members "reached their individual and collective decision on the merits, free from any dictation or suggestion by the Attorney General or any of his assistants or anyone else acting or purporting to act for him." That finding is supported by the sworn and unequivocal testimony of the Board members who

sat on Accardi's case—the Chairman testifying in person and the others by deposition—and I cannot regard the finding as "clearly erroneous." Nor can I agree with Judge Clark who holds, as I understand his concurring opinion, that we may accept the finding but side-step its effect. Such a result can be achieved only by giving the Supreme Court's opinion an interpretation which I do not think it will bear.

In my view, the dismissal of the writ should be sustained.

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of January one thousand nine hundred and fifty-five.

Present: Hon. Charles E. Clark, Chief Judge; Hon. Jerome N. Frank, Hon. John M. Harlan, Circuit Judges.

UNITED STATES EX REL. JOSEPH ACCARDI, RELATOR-APPELLANT

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION & NATURALIZATION, ETC., RESPONDENT-APPELLEE

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript

of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and action remanded in accordance with the opinion of this Court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

(S.) A. DANIEL FUSARO,
Clerk.

Filed January 7, 1955.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK DISTRICT, DEPARTMENT OF JUSTICE,
PETITIONER

v.

UNITED STATES EX REL. JOSEPH ACCARDI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

[redacted]
Solicitor General,
[redacted]
Assistant Attorney General,
[redacted]
Special Assistant to the
Attorney General,
[redacted]
Attorneys,
Department of Justice,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 616

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK DISTRICT, DEPARTMENT OF JUSTICE, PETITIONER

v.

UNITED STATES EX REL. JOSEPH ACCARDI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion, concurring opinion, and dissenting opinion in the Court of Appeals (R. 197-215) have not yet been reported. The findings and conclusions of the District Court appear at pages 188-190 of the record.

The prior opinion of this Court in this cause is reported at 347 U.S. 260.

JURISDICTION

The judgment of the Court of Appeals was entered on January 7, 1955 (R. 215-216). The petition for a writ of certiorari was filed on February 24, 1955, and was granted on March 14, 1955 (R. 216). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, upon the unchallenged testimony of members of the Board of Immigration Appeals that they understood that the inclusion of aliens in the Attorney General's program for deporting undesirable aliens meant only that the Board was to give priority to such cases, the court below properly applied this Court's decision in *Accardi* v. *Shaughnessy*, 347 U.S. 260, in presuming that the mere existence of such a program prevented the Board from exercising its independent discretion on respondent's application for suspension of deportation.

STATUTES AND REGULATIONS INVOLVED

Section 19(c) of the Immigration Act of 1917 and implementing regulations 8 C.F.R. (1951 Supp.) 150.7, 150.9 and 151.3 are set forth in the Appendix, *infra*, pp. 51-54.

STATEMENT

In its prior opinion in this cause, *Accardi* v. *Shaughnessy*, 347 U.S. 260, this Court ruled that the allegation, in the petition for habeas corpus seeking review of an order of deportation, that the denial of respondent's application for suspension

of deportation by the Board of Immigration Appeals had been caused by the prejudgment of his case by the Attorney General, raised an issue of fact which required a hearing. The Court pointed out that it was charged in the petition that the Attorney General had previously and publicly described respondent as an undesirable alien and that "proof was offered and refused that the Commissioner of Immigration told previous counsel of petitioner, 'We can't do a thing in your case because the Attorney General has his [respondent's] name on that list of a hundred' " (347 U.S. at 267). After noting that the petition for habeas corpus charged the Attorney General with dictating the decision of the Board, and that the offer was to prove such fact, 347 U.S. at 267, the Court said, at page 268:

> It is important to emphasize that we are not here reviewing and reversing the *manner* in which discretion was exercised. * * * Rather, we object to the Board's alleged *failure to exercise* its own discretion, contrary to existing valid regulations [emphasis in original].
>
> If petitioner can prove the allegation, he should receive a new hearing before the Board without the burden of previous proscription by the list * * *, which is nothing more than what the regulations accord petitioner as a right. Of course, he may be unable to prove his allegation before the District Court; but he is entitled to the opportunity to try. If successful, he may still fail to convince the Board or the

Attorney General, in the exercise of their discretion, that he is entitled to suspension, but at least he will have been afforded that due process required by the regulations in such proceedings.

Following the decision by this Court, the District Court issued a writ of habeas corpus on May 10, 1954 (R. 8-9). After the filing of a return to the writ, supplemented by affidavits, a traverse, interrogatories, and responses thereto (R. 10-55), District Judge McGohey held a hearing on June 23, 1954 (R. 84), at which relator attempted to prove his allegations. The Chairman of the Board of Immigration Appeals testified at the hearing (R. 84-133), and this oral testimony was supplemented by depositions of former Attorney General McGranery (R. 134-145), members of the Board (R. 56-72), and Michael J. Horan, a Special Assistant to the Attorney General (R. 73-83). The evidence adduced may be summarized as follows:

The record before the Board disclosed that respondent had entered the United States without a visa in 1932 (R. 177-178). His deportability is not contested. He was convicted of conspiracy to defraud the United States over a period between 1934 and 1937 (R. 178). His record also showed arrests in 1933 (as a disorderly person) and in 1934 (one arrest for possession of lottery slips, and another for violation of liquor laws), and several indictments by a federal grand jury for violation of the internal revenue laws, the latest being in 1940 (R. 179, 183).

Proceedings to deport respondent were instituted in 1947 and hearings were begun in 1948 (R. 178). Thereafter, on April 23, 1949, respondent married a legally resident alien; a child was born to them in the United States on October 8, 1951 (R. 173, 179). Respondent's wife testified that she was completely dependent upon respondent for support (R. 173). Respondent also claimed that since 1941 or 1942 he had supported his father (R. 173). At the hearing before the Immigration and Naturalization Service hearing officer, evidence disclosed that respondent's father had conveyed to a daughter-in-law assets of $50,700 during the years 1943 and 1944 (R. 173). Moreover, respondent failed to bring forward requested data as to his finances (R. 175). He presented four witnesses who testified, upon varying degrees of acquaintance, to his good repute (R. 173-175).

The hearing officer, on May 15, 1952, recommended against grant of the discretionary suspension of deportation (R. 176). On July 7, 1952, the Acting Assistant Commissioner of Immigration, upon consideration of the record and the hearing officer's report, and adverting *inter alia* to the doubtful aspect of "unexplained sources of income," held (R. 180):

> In view of all the circumstances regarding [respondent's] sources of income, his assets, and his manner of earning a living, together with his previous arrest record and his conviction record, it is indicated that relief from deportation is not justified in this case * * *.

On April 3, 1953, the Board of Immigration Appeals concurred in the denial of the application for discretionary relief (R. 181-184).

After the rulings of the hearing officer and the Assistant Commissioner, while respondent's appeal to the Board of Immigration Appeals was pending, the then Attorney General instituted a program for the vigorous prosecution of deportation proceedings against aliens believed to be "engaged in racketeering and other criminal activities" (R. 137). Respondent was included within the program on November 19 or 20, 1952 (R. 54, 74, 79, 82). According to the evidence before the District Judge, the origin and nature of the program were as follows:

Attorney General McGranery held a conference with F. B. I. Director Hoover in which he asked for the names of racketeers and undesirables who had obtained their citizenship through fraud or were subject to deportation. Thereafter, he called a meeting of officials of the Department of Justice, and Thomas J. Donegan was placed in charge of coordinating the investigation and preparation of charges in these deportation matters (R. 138-139). Recommendations for adding names to the Attorney General's deportation program could come from the Immigration and Naturalization Service, the F. B. I., the Criminal Division, or the Deputy Attorney General's Office (R. 75). These units were represented on the Coordinating Committee, of which Donegan was chairman and Michael J. Horan the assistant (R. 76).

Mr. McGranery stated in his deposition that his program was for the purpose of "deporting and ridding the nation of undesirable aliens engaged in racketeering and other criminal activities" (R. 136-137). There was no static list of potential deportees, but the list was constantly changing from day to day as the records were studied (R. 135-136). Respondent was included within the program when an F.B.I. report and the Attorney General's own investigation indicated that respondent was a racketeer.

The existence of the program was disclosed in a press release of October 2, 1952 (R. 148-149). It referred to the "final goal" of restoring the dignity of citizenship; the necessity to "thwart the criminal activities" of "naturalized racketeers" by means of "a series of individual petitions to the District Courts to revoke naturalization"; and "appropriate" action for deportation to be taken against "unsavory characters." Thereafter, when proceedings were instituted against various aliens within the program, announcement of this fact would be made to the press (see R. 166-167).

The former Attorney General testified that he never sent out a list of individuals within the program (R. 142) nor did he ever indicate to the Board "either directly or indirectly [his] feelings as to how they should determine a case" (R. 142). The Board was only to expedite the cases (R. 144).

Horan likewise testified that priority was to be given program cases (R. 75), but at no time did

he, or anyone else to his knowledge, suggest to the Board how a case should be decided (R. 83).

Thomas G. Finucane, Chairman of the Board of Immigration Appeals at the time respondent's case was before it, testified in person before the District Court. His testimony was as follows:

He first became aware of the Attorney General's program, as announced in the official press release of the Department of Justice on October 2, 1952 (R. 148-149), by reading of it in the newspapers and then receiving a copy of the press release (R. 103-104). He probably circulated this press release among the other Board members as the normal practice, although he had no specific recollection on this (R. 104-105). Finucane did not understand the program to be one for intensifying efforts looking toward deportation and denaturalization of subversives and racketeers, but rather to intensify efforts in the prosecution of such cases (R. 111). Neither Donegan nor Horan of the Department of Justice ever called Finucane regarding the program (R. 111-112).

About two or three months after the announcement, Mr. Rawitz of the Immigration Service asked whether the Board could expedite the consideration of cases under the program. Finucane stated that the Board would do so. (R. 107.) The procedure adopted was for Rawitz to give the Board's calendar clerk a written memorandum showing a case to be within the program, but in some instances oral communications may have been employed (R. 109-110).

There was, however, no written communication to the Board to expedite the hearing of respondent's case, and Finucane recalled no oral request for this (R. 109-110, 126-127). He also stated that the Board members did not receive any instructions from the Attorney General or any of his subordinates as to how respondent's case should be decided on its merits (R. 126).

Finucane testified that when respondent's case was decided, no press release or order of the Attorney General was before the Board members or discussed by them, and that their decision was "free and undictated" (R. 113-114). No member of the Board or its staff had anything to do with the preparation of the Department of Justice press release on April 3, 1953, announcing the Board's decision (R. 114-115, 149-150).

The depositions of the members of the Board attested the same understanding of the total contact and responsibility of the Board with respect to the program, not only as it affected respondent's case but in every program case (R. 68-69). However, the members other than the Chairman were not familiar with the mechanics of notice to the Board concerning program cases. Two had no knowledge of the existence of the practice and none knew when the practice had been begun (R. 63). All four stated that they never received any communications from anyone in government indicating that a case should be decided adversely to the alien, nor did they understand any press release or announcement, or any notification that

an alien was within the program, as being an indirect intimation, suggestion, or hint to that effect (R. 71-72).

With respect to any knowledge, at the time of the decision, that respondent was within the program, one of the members definitely testified that he did not have that knowledge, and none of the three other members could definitely testify that they recalled such knowledge.[1]

The Board members unanimously testified that, even if they had known that respondent's name was included in the program, this would not have influenced their decision on the merits and they would not have construed this as dictation by the Attorney General for an adverse decision (R. 72).

No proof was offered in support of respondent's earlier contention, noted by this Court (*supra*, p. 3), that the Commissioner of Immigration had told his attorney that "We can't do a thing in your case because the Attorney General has his [respondent's] name on that list of a hundred."

The District Court, in dismissing the writ of

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[1] "A. (Mr. Charles) On the date of the rendition of that decision, I had no personal knowledge that such was the situation.

"A. (Mr. Nettleton) I have no knowledge at this time whether I knew or not. I may have known, but I couldn't say.

"A. (Mr. Ludwig) I can't say with definiteness, but it is my opinion that on April 3rd at the time the decision was rendered, I knew that Accardi was on the list.

"A. (Mrs. Wilson) I have no recollection that I knew he was on the list, whether or not he was on the list." [R. 69.]

The Chairman believed, from earlier talks with all four, that they had not been aware of the inclusion (R. 110, 128).

habeas corpus, held that relator had failed to prove his charge (R. 187-190), making the following pertinent findings:—that in the fall of 1952 the then Attorney General inaugurated and publicly announced a program to deport aliens believed to be engaged in organized crime (R. 188-189); that the Board of Immigration Appeals was not one of the agencies represented in the coordinating group established to effectuate the program (R. 189); that the Chairman of the Board was notified either orally or in writing that a specific alien was embraced in the program, the notification being "sometimes passed on to other Board members, sometimes not" (R. 189); that "[t]he purpose of the notification, and it was so understood by the Board, was merely to indicate that the Attorney General desired expeditious consideration and determination of the appeal" (R. 189); that "[n]either such notification nor the existence of the program was considered by the Chairman or by any Board member as a direction by the Attorney General, or even as a hint by him, to decide an appeal adversely to an alien. Moreover, that these matters were given no weight by the Board in their deliberations" (R. 189); that "[i]n accordance with the practice in such cases, notice was given to the Board that [respondent] was an alien embraced within the Attorney General's program" (R. 189); that—

> 6. The Attorney General never discussed his program with the Chairman or any Board

member. There is no evidence, nor is it claimed, that he ever discussed [respondent's] or any other case with any of them.

7. The Board members and each of them who considered [respondent's] appeal reached their individual and collective decision on the merits, free from any dictation or suggestion by the Attorney General or any of his assistants or anyone else acting or purporting to act for him.

8. The Board's adverse decision on [respondent's] appeal is adequately supported by the evidence before the Board.

The District Court further stated (R. 190):

This Court has had the advantage of seeing and hearing the Board's Chairman on the stand and accepts completely his testimony which was neither shaken nor controverted. The testimony of the other witnesses was introduced through their depositions, all of which have been carefully read. It is significant that none of this testimony is in any respect contradicted or shaken. [Respondent's] position here reduces to the mere suggestion that the Court should disbelieve the witnesses' denials and accept the inferences relator draws from the existence of the Attorney General's program and the practice of notification. I find no rational basis for disbelieving the witnesses, and relator's inferences are clearly

refuted by the testimony which is fully accepted.

On appeal, the judgment was reversed and remanded by the Court of Appeals for the Second Circuit, Judge Harlan dissenting (R. 197-216). Judge Frank of the majority read this Court's prior opinion as holding that respondent was entitled to a new hearing if he could prove that he was one of the persons to whom the Attorney General's statements and press releases referred, that a majority of the Board knew that fact, and that they were affected by it when they denied him discretionary relief (R. 200). Judge Frank accepted as a fact that the Board members consciously believed, when they testified, that the Attorney General's statements amounted to no more than a direction to give priority to a case on the program, but he found it impossible to believe that, in determining respondent's application for discretionary relief, they were not unconsciously influenced by knowledge that his name was included in the program (R. 201-204). Accordingly, he ruled that respondent was entitled to be discharged unless accorded a new hearing before the Board under the new instructions issued by the present Attorney General on April 23, 1954, after this Court's prior decision in the case.[2] Judge Clark, concurring,

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[2] These instructions declared in part (R. 18):

> * * * [N]either the selection nor the identification of cases believed to be within the scope of this program is any responsibility of those exercising adjudicatory func-

was of the view that it was unnecessary to speculate about the effect of the Board's knowledge of the program on the exercise of its discretion; that the prior opinion of this Court merely required respondent to prove, as he had, that there was a program, that respondent was included within it, and that such fact was known to the Board. He concluded that such facts "create a presumption of bias not overcome by the Board's self-serving declaration to the contrary. This would be so, whether the program was one of expedition or one of deportation, for in either case [respondent] was being singled out as an alien whose imminent departure was deemed desirable by the Attorney General." He also expressed doubt as to whether the Attorney General's instructions of April 1954 constituted a withdrawal of the list. (R. 214.) Judge Harlan, dissenting, was of the opinion that this Court had held that the issue on remand was "whether the Board's denial of discretionary relief represented its own untrammelled decision or one dictated by the Attorney General"; that the trial judge's finding that the board mem-

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tions in deportation proceedings. Effectuation of the program has been and continues to be, the responsibility of those charged with prosecuting duties. Accordingly, it is not intended that there be any departure from the regulations in the hearing and decision of any individual case, whether or not it is thought to fall within the policy of deporting criminal or subversive aliens.. Those charged with the duty of hearing and deciding must give each alien a fair and impartial trial, without prejudgment on the basis of assertions by any official having the function of prosecuting these cas s.

bers reached their decision "free from any dictation or suggestion by the Attorney General" or anyone acting for him was not clearly erroneous; and hence that the order of the District Court should be sustained (R. 215).

SUMMARY OF ARGUMENT

I

A year ago this Court held that respondent was entitled to a hearing on his allegation that, in considering his plea for executive clemency through suspension of deportation, the Board of Immigration Appeals had failed *"to exercise* its own discretion, contrary to existing valid regulations." *Accardi* v. *Shaughnessy*, 347 U. S. 260, 268. The existence of the Attorney General's deportation program and respondent's inclusion under it were acknowledged in the record and in the government's presentation at that time. *Id.* at 264-265. Had these facts been sufficient to require a new hearing before the Board of Immigration Appeals, there would have been no occasion for the remand to the District Court.

Accordingly, we agree with Judge Frank (R. 200) that respondent was required to establish in the District Court that

> (1) he was one of the persons to whom the Attorney General thus referred, and
>
> (2) a majority of the Board knew that fact, and

(3) the majority was affected by it when the Board denied him discretionary relief.

We also agree that the third of these assertions presents the critical issue. And we urge that the court below erred in disregarding all the testimony in the record and rejecting the District Court's finding that respondent had failed to prove this decisive allegation.

II

Whether the Board members failed to exercise their discretion is, as Judge Frank observed (R. 201), a question of fact. The evidence amply sustained the District Court's finding that the Board had in fact reached an independent judgment. Generalizations about "human nature" do not justify rejection of the finding.

A. The Chairman of the Board testified personally, the other members by deposition. All swore that they regarded the Attorney General's program as concerning exclusively the Department's prosecutors and as affecting adjudications only to the extent of requiring expedition in the hearing of cases under the program. They had never had any suggestion from anyone that the existence of the program was to influence their decision in any case. They had decided this case, like others, on its own merits.

Former Attorney General McGranery, who instituted the program, testified to the same effect. Press releases and statements by the Department of Justice likewise reflected that while "program"

cases were to be prosecuted with vigor, there was no purpose to eliminate or circumvent the process of independent decision by officers of the Department responsible for adjudications.

The Board's decision in this case on its face supports the testimony that the Board exercised the independent judgment required by the regulations. Respondent made out a wholly unconvincing case for clemency. The hearing officer and Acting Assistant Commissioner had denied it before inauguration of the Attorney General's program. Respondent's criminal record, his claim of an apparently affluent father as a dependent for tax purposes, and the obscurity (which he was invited but failed to clarify) as to his sources of substantial assets justified these decisions, with which the Board subsequently agreed, that he did not merit suspension of deportation. True, the Board referred to character witnesses and investigation revealing that respondent was "considered" a person of good moral character (R. 183-184). But this recognition that there were factors to be weighed on both sides, far from supporting the claim of "prejudgment," helps to demonstrate that the Board was exercising its own discretion in deciding the merits of respondent's application. Other cases under the program, in some of which there have been determinations favorable to the alien, point to the same conclusion.

The District Court found from the evidence that the Attorney General had not influenced the Board, that the members of the Board had stated the true

facts when they said that their decision had been reached "on the merits, free from any dictation or suggestion by the Attorney General or any of his assistants or any one else acting or purporting to act for him" (R. 190). There was no basis in the record for rejecting these decisive findings as "clearly erroneous."

B. The members of the Board of Immigration Appeals have each held their posts for many years. Seasoned in the duty of judging serious matters, their sworn testimony that they judged fairly and independently in this case as in others carries assurance that they understood fully what such testimony meant. Moreover, their long experience in following the regulations requiring exercise of their independent judgment fortifies the usual presumption that they behaved properly in this case.

Against the testimony of the Board members, the presumption of regularity, and the findings of the District Court, Judge Frank invokes generalizations concerning "human nature" to show that the Board must "unconsciously" have been influenced by the Attorney General to abdicate the discretion it is required by the Attorney General's regulations to exercise. Such speculation cannot justify holding "clearly erroneous" the District Court's contrary finding from the evidence in this case.

Subordinates in government and business are frequently called upon to make independent determinations on matters concerning which their superiors have stated preliminary judgments. Judges must decide suits against high executives

who exercise power over appointments to higher benches. Hearing officers and agencies themselves must decide cases where the determination to prosecute has been made by the agency. It has never been supposed that some "unconscious" pressure toward prejudgment vitiates the process of decision in such cases. To the contrary, this Court has rejected claims that an initial judgment to prosecute, or even a general statement on the merits of a problem, disables a tribunal from deciding fairly. *Fahey* v. *Mallonee*, 332 U. S. 245, 256; *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 700-703. Similarly, the Court has refused to impute constructive bias to juries drawn from government employees (*Dennis* v. *United States*, 339 U. S. 162), and has rejected inquiry into the mental processes leading to a decision fair on its face (*United States* v. *Morgan*, 313 U. S. 409, 421-422). Here, where all the testimony affirms that the Board exercised the judgment called for by the regulations, psychological generalities of the type invoked by Judge Frank do not warrant a conclusion, opposed to that of the trier of facts, that this could not have been so.

We do not deny, of course, that there is basis in experience for Judge Frank's view that some people would be influenced in exercising discretion by the supposed will of their superior. But there is strong basis also for the belief—erected by the law into a presumption—that responsible people do their duty, tell the whole truth, and exercise their discretion when they are supposed to. Like

every trier of facts, the District Judge—who saw, questioned, and believed the Board Chairman as well as having the opportunity to read the depositions—must be supposed to have brought to his deliberations the wisdom which encompasses all such generalizations. His findings reveal the care with which he considered the matter. His conclusion that the testimony stated the facts should have been sustained.

ARGUMENT

As the Court noted when this case was here a year ago (347 U. S. at 261-262), there has never been any question in these proceedings, begun in 1947, that respondent is a deportable alien, having entered the United States illegally. The single issue has been whether his application for relief by suspension of deportation—a kind of executive clemency allowable solely in the discretion of the Attorney General, and requiring the approval of Congress in each instance—was heard in accordance with "that due process required by the regulations [of the Attorney General] in such proceedings." *Id.* at 268. This issue, as it is now posed by the decision below, turns on whether the District Judge, the trier of the facts, could reasonably believe the uncontroverted testimony of the members of the Board of Immigration Appeals that they had followed the regulations, from which they had never been authorized to depart. Holding to the contrary, the majority below rejected the findings of the District Court as "clearly erroneous." They

held, in effect, that the "board's alleged *failure to exercise* its own discretion" (347 U. S. at 268, emphasis in original)—which, under this Court's decision, respondent was required to prove on the remand—must be presumed to have been established from the facts that (1) respondent was one of a group of aliens to whom the Attorney General had referred as specially undesirable and against whom deportation proceedings were to be prosecuted with special expedition, and (2) the Board of Immigration Appeals knew this.

We believe, with Judge (now Mr. Justice) Harlan, who dissented, that the majority below has misconstrued the decision of this Court. The record of the judicial hearing respondent was granted by order of this Court establishes convincingly that the Board heard fully and fairly his application for suspension. It shows that he was denied the discretionary clemency he sought, not because of any "presumed" or "unconscious" bias of the Board, but because in the free exercise of its own judgment the Board concluded that his dubious biography did not warrant this relief reserved for deportable aliens who can affirmatively establish the desirability of their presence here. At the least, we submit, the findings of the District Court to this effect could not properly be rejected on appeal as "clearly erroneous."

I

This Court's Prior Decision, Remanding for a Hearing by the District Court, Did Not Hold That the Existence of the Attorney General's Program, Which Was Acknowledged Then, Was in Itself Sufficient to Prove the Allegation of Prejudgment

Recognizing that the controversy in this case relates to a plea for executive clemency, available only in the discretion of the Attorney General (which, when favorably exercised, must be approved by Congress), this Court expressly refrained from "reviewing and reversing the *manner* in which discretion was exercised." *Accardi* v. *Shaughnessy*, 347 U. S. 260, 268. Instead, the Court confined its objection narrowly and precisely "to the Board's alleged *failure to exercise* its own discretion, contrary to existing valid regulations." *Ibid.* And in the sentence immediately following, the problem to be resolved on the remand was stated in terms of this objection (*ibid.*): "If petitioner can prove the allegation [namely, "the Board's alleged *failure to exercise* its own discretion"], he should receive a new hearing before the Board without the burden of previous proscription by the list."[3]

As the Court noted (347 U. S. at 264-265), the existence of the Attorney General's program, and the inclusion of Accardi's name under it, had already been acknowledged in the District Court.

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[3] Compare the quotation from this portion of the opinion, overlooking the passage which has seemed critical to us, in the opinion of Judge Frank (R. 198).

The Government's brief in this Court specifically referred to, and nowhere denied, the existence of this program (Brief for the Respondent, Oct. Term, 1953, No. 366, pp. 17, 26-27, 29, 31, 32, 35, 37, 47). Accardi's name was plainly on the program. If these facts were enough to require a new hearing before the Board of Immigration Appeals, there was no occasion to remand for the taking of evidence in the District Court. But the case was remanded, and obviously not merely for *pro forma* proof of the program which the Government had freely acknowledged. For this Court envisaged that respondent "may be unable to prove his allegation before the District Court" (347 U. S. at 268), an impossible assumption if formal proof of the program would be sufficient. It is true that the record on the prior appeal did not show explicitly that the Board knew that Accardi's was a "program" case, but the probability that notice of this had reached the Board lay close to the surface. If this was all that had to be established on the remand, it surely would have been simply said. Instead, the Court remanded for trial of a more complex issue of fact—whether the Board had *in fact* been guilty of a *"failure to exercise* its own discretion, contrary to existing valid regulations." 347 U. S. at 268.

The issue had been so formulated by the petition for habeas corpus. It was alleged, not merely that there was a list and that respondent was on it, but "that because of the listing * * * and because of consideration of matters outside the record of his

immigration hearing, discretionary relief [had] been denied"; that "it [had] been impossible for [Accardi] to secure fair consideration of his case" (R. 4, 5). There was even a significant offer of proof, which Judge Frank had relied upon in his dissent (206 F. 2d 897, 903) and which this Court included in its statement of the factors deemed to render the petition for habeas corpus sufficient to require a hearing. The Court observed (347 U. S. at 267) that

> proof was offered and refused that the Commissioner of Immigration told previous counsel of petitioner, "We can't do a thing in your case because the Attorney General has his [petitioner's] name on that list of a hundred."

At the ensuing hearing this Court ordered, there was no attempt to make good on this damaging offer of proof. As we show in detail below (pp. 27-36), far from substantiating the assertion that respondent's case was not fairly heard by the Board, the hearing produced only uncontradicted testimony to the contrary. Here, preliminarily, we emphasize our view—contrary to that of Judge Clark—that this Court's earlier decision does not justify the result reached by the majority below in the face of such evidence.

We note, too, that our appraisal of this Court's mandate is substantially the same as that stated by Judge Frank.[4] He concluded (R. 200) that this

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[4] Judge Harlan's opinion also interprets the prior *Accardi* decision in the same way as we do. On this issue, therefore, the majority of the court below agrees with the Government.

Court meant to grant respondent a new hearing before the Board of Immigration Appeals if he could prove that

> (1) he was one of the persons to whom the Attorney General thus referred, and
>
> (2) a majority of the Board knew that fact, and
>
> (3) the majority was affected by it when the Board denied him discretionary relief.

Judge Frank found that there was an "issue of fact" only as to the third proposition: "Was a majority of the Board members influenced by that knowledge?" (R. 201.) On this decisive issue, the District Court found against respondent. Judge Clark, relying on an erroneous reading of this Court's opinion, found that it was not a separate issue at all under the mandate—that influence on the Board must be conclusively presumed from proof "that there was a list as alleged, that [respondent] was on it, and that this fact was known to the Board" (R. 214). Judge Frank, despite his differing statement of the issues, reached a substantially similar conclusion, though he explained it on "factual" generalizations concerning "human nature" and "unconscious" influences.

On the correct statement of the issue, the problem here is plain enough. It is whether there is justification for reversing as "clearly erroneous" the District Court's finding—"supported by the sworn and unequivocal testimony of the Board members who sat on Accardi's case" (Judge Har-

lan, dissenting (R. 215)—that the Board members "reached their individual and collective decision on the merits, free from any dictation or suggestion by the Attorney General or any of his assistants or anyone else acting or purporting to act for him" (R. 190). Our argument is that the record sustains the decision of the District Court. Against the sworn testimony of the Board members that they followed the regulations governing them, neither speculative analyses of their unconscious motivations nor any "presumption of bias" requires a finding that they did not.

II

The Board of Immigration Appeals Exercised Its Independent Judgment and Properly Found That Accardi Did Not Merit Suspension of Deportation

It should be emphasized at the outset of our second, and major, point that this whole case arises out of the Attorney General's own regulations governing decisions by the Board of Immigration Appeals.[5] The respondent has not suggested, nor could he, that, apart from the regulations, he

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[5] This Court's prior decision, *Accardi* v. *Shaughnessy*, *supra*, left no doubt that it was the regulations which gave Accardi the right he alleged had been violated. The Court stated that these regulations "prescribe the procedure" in question (347 U.S. at 265); that, under the regulations, "the Board was required, as it still is, to exercise its own judgment when considering appeals" (*id.* at 266); that what was alleged was a violation of "that due process required by the regulations in such proceedings" (*id.* at 268); and that *"as long as the regulations remain operative,* the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner" (*id.* at 267, emphasis added).

would be entitled to any procedural rights governing the Attorney General's exercise of discretionary power to suspend deportation. The question, then, is simply stated as being whether the Board ignored the regulations under which it proceeds.

It is clear that the regulations were at no pertinent time expressly suspended or waived by the Attorney General. And so the problem is to determine whether the Board viewed the Attorney General's program as a hint, or as pressure, to ignore the regulations in cases falling within the program. This is, as Judge Frank recognized (R. 201), a question of fact. It is to be weighed, of course, in the light of judgments based on human experience and in the context of the legal traditions governing our trials of issues of fact. It is pertinent, to be sure, that officials are sensitive to the wishes of their superiors. It is not less pertinent that officials are presumed to, and characteristically do, obey the laws and the regulations under which they act. In the center of the setting provided by such generalities is the concrete testimony in this case.

A. *The Evidence Adduced at the District Court Hearing Did Not Prove, but Affirmatively Disproved, the Allegation of Prejudgment*

1. All five members of the Board of Immigration Appeals testified in this case, the Chairman orally and the other four members by deposition. All asserted firmly and unequivocally that their decision against suspension of deportation was based

solely on Accardi's record, wholly uninfluenced by any knowledge that his name was among those in the Attorney General's program (R. 71-72, 114, 125, 126). All regarded the program as affecting the Department's prosecuting activities, not as a directive or suggestion as to how the merits of any case should be adjudicated (R. 68, 70, 105, 111).[6] They had never received any communication from anyone in the Government indicating that a case should be decided adversely to the alien, nor did they understand any press release, announcement, or notification that an alien was within the program as being an indirect intimation or hint to that effect (R. 71-72, 106, 126). Under questioning by the trial judge, the Chairman of the Board testified as follows (R. 114):

> The Court: At any time during the conference in which this matter was to be considered was any order or direction or press release of the Attorney General before you?
>
> The Witness: No, your Honor.
>
> The Court: Was there any discussion among you or any other members of the Board of the import or effect of any press release or direction by the Attorney General?
>
> The Witness: No, your Honer, there was not.
>
> The Court: Was the decision you arrived at a free and undictated decision of each member of the Board?

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[6] As the District Court found (R. 189), the Board was not among the agencies of the Department of Justice concerned with administering the Attorney General's program.

The Witness: It was, your Honor.

The Court: Was there unanimity among you or was there some dissent?

The Witness: There was no dissent.

Far from having reason to regard the Attorney General's deportation program as a directive or suggestion to the Board, the Chairman first became aware of the program upon its public announcement in the press (R. 104). Later, an arrangement was inaugurated (*supra*, p. 8) under which the clerk of the Board was notified of the inclusion of any particular alien within the program. The sole understanding as to this notification was that the particular case was to be expedited (R. 108); the notification was in no sense considered as relating to the merits (R. 83). The members other than the Chairman were not familiar with the mechanics of notice to the Board concerning program cases. Two had no knowledge of the existence of the practice, and none knew when it had begun. (R. 63.) As we have noted (*supra*, p. 10), the Board members could not recall whether they knew at the time of their decision of Accardi's inclusion in the program, but all were clear that this would not in any event have been regarded by them as intended to influence their judgment and that they would have reached an independent conclusion on the merits as in any other case.

The testimony of former Attorney General McGranery, who had instituted the program, and of Michael J. Horan, assistant to the co-ordinator of

the program, demonstrated further that the Board was neither instructed, pressured, nor intended to be influenced by the drive to expedite prosecution of deportation proceedings against aliens believed to be peculiarly undesirable. Mr. McGranery testified that he had never spoken to any member of the Board regarding such cases, that he had never indicated to the Board either directly or indirectly how they should determine any case (R.142-143).[7] Mr. Horan described the program as being designed for expedition of the proceedings, and stated that neither he nor anyone else to his knowledge had ever suggested to the Board how any case should be decided (R. 75, 83).

The various press releases and public announcements pertaining to the institution and subsequent actions under the Attorney General's program—all of which were before the Court a year ago and are again in the record (R. 148-159)—were entirely consistent with this testimony. The statements throughout refer to vigor in prosecution, but affirmatively indicate at the same time that each case was to be heard in the customary manner. Thus, there are references in these materials to the institution of "appropriate" action, to the holding of aliens "for hearing," to the contemplated

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[7] The present Attorney General's Order, issued following this Court's earlier decision in this case, reflected the same continuing understanding. The Order, quoted more fully in fn. 2, pp. 13-14, *supra*, pointed out that the program concerned "those charged with prosecuting duties" and was not intended to alter the duty of independent judgment imposed by the regulations on those exercising adjudicating responsibilities.

consequences which were to follow "if" proposed charges were proved, to the recognition of a need for a "fair hearing." These declarations were not only consistent with but affirmatively demonstrated the fact that the institution of proceedings was in no case intended to deprive the alien of a fair hearing or of fair consideration of pleas for clemency.

In short, the testimony, summarized more fully in the Statement (pp. 6-10, *supra*), fairly refuted the claim that the Board or anyone else with responsibility for adjudication had been subjected to influence of any kind in deciding this case or others under the program. Not a shred of testimony pointed the other way. The dramatic offer to prove that the Commissioner of Immigration had told Accardi's former counsel that the program precluded favorable action of any kind in this case was not fulfilled or even mentioned. *Supra*, pp. 3, 10). Beyond the facts that there was a program and that the Board knew of it, respondent's case rested on the bald assertion that the Board members could not be believed when they swore that they had duly exercised their judgment on the merits of his case.

2. Analysis of the Board's actual decision in this case buttresses the testimony that the Board duly exercised the independent judgment the regulations require in such proceedings. While this Court is not the place to decide the merits of an application for suspension of deportation (see 347 U. S. at 268), it is certainly relevant that respond-

ent made out an exceedingly poor case for executive clemency. The record showed that respondent had entered the United States without a visa in 1932 (R. 177-178); that he was convicted of conspiracy to defraud the United States over a period between 1934 and 1937 (R. 178); and that he had been arrested and indicted for several offenses (R. 179-183). There was a striking discrepancy between his claiming his father as a dependent for tax purposes and the father's conveyance of $50,700 to a daughter-in-law in 1943 and 1944 (R. 173, 183-184). There was a pervasive obscurity about the source of petitioner's assets and an unwillingness or inability to explain his financial affairs satisfactorily (R. 175, 179-180, 183). Efforts to deport him began in 1947, and the dependents upon whom he relies for suspension were not acquired until 1949 (wife) and 1951 (child) (R. 173, 178-179).

Upon the foregoing facts, a hearing officer and the Acting Assistant Commissioner had denied suspension long before the institution of the Attorney General's program (R. 177, 180). The Board reached the same conclusion, solely upon "the facts and circumstances in the case" (R. 184). It made no reference to matters outside the record—which, the Chairman testified (R. 127), is done where such matters are considered.[8] Its de-

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[8] See *United States ex rel. Matranga* v. *Mackey*, 115 F. Supp. 45 (S.D. N.Y.), affirmed, 210 F. 2d 160 (C.A. 2), certiorari denied, 347 U.S. 967; *Alexiou* v. *McGrath*, 101 F. Supp. 421 (D. D.C.).

cision is, we submit, amply justified and explained by the record. As the District Court found (R. 190), "The Board's adverse decision on Accardi's appeal is adequately supported by the evidence before the Board."

It is true, as Judge Frank observed (R. 203), that the Board's decision noted that affidavits, testimony of character witnesses, and investigation showed that Accardi was "considered" a person of good moral character (R. 183-184). Judge Frank went on to point out (R. 204) that a Department of Justice press release following the Board's decision described Accardi as a "racketeer." But it is impossible to see how this juxtaposition does anything but help to demonstrate the separateness of the Board's proceedings from the Attorney General's program and the publicity attending it. Surely, had the Board felt itself consciously or unconsciously influenced by the program, its decision would have conformed more closely to the Department's subsequent press release. Insofar as the Board's decision reflects the weighing of pros and cons, insofar as it displays a need for judgment and a process of judgment, insofar as it is less than a ringing denunciation of respondent as a scoundrel, it evidences what the Board members later swore was true—that they exercised their own discretion, as the regulations required.

Other circumstances of the Board's decision point to the same conclusion. The case was heard by the Board on November 26, 1952 (R. 181). The Board's decision was rendered on April 3, 1953

(ibid.), in what the Chairman described as "about normal routine time" (R. 118). So this particular case was not even accorded the priority assigned to other cases under the program as a matter of the Board's administrative routine (R. 117). In every respect, it appears on its face to be the customary, independent kind of judgment its authors claimed it was.

Other cases of aliens under the program add further support to this view. As we noted when this case was here before (Resp. Br. 35-36, No. 366, O. T. 1953), action favorable to the alien had been taken in several cases of this kind. Judge Frank observed (R. 205) that this argument was unpersuasive to this Court, and we acknowledge our failure to show that there was no need for a hearing on the petition for habeas corpus. But the case is in a different posture now. There has been a hearing. The testimony is all one way—against the allegation of prejudgment. The problem remaining is whether generalizations of one kind or another require rejection of this testimony or sustain the finding of the District Court that the sworn statements of the Board members reflected the true facts. For the resolution of this problem, it seems apposite that not only this case but others in the same category bear evidence that the Board has followed the usual procedures under the regulations in reaching its independent determinations, and that there have been several decisions favorable to "program" aliens.

3. From the evidence before it, the District Court made the following findings (R. 190):

> 6. The Attorney General never discussed his program with the Chairman or any Board member. There is no evidence, nor is it claimed, that he ever discussed this relator's or any other case with any of them.
>
> 7. The Board members and each of them who considered Accardi's appeal reached their individual and collective decision on the merits, free from any dictation or suggestion by the Attorney General or any of his assistants or anyone else acting or purporting to act for him.
>
> 8. The Board's adverse decision on Accardi's appeal is adequately supported by the evidence before the Board.

This Court has had the advantage of seeing and hearing the Board's chairman on the stand and accepts completely his testimony which was neither shaken nor controverted. The testimony of the other witnesses was introduced through their depositions, all of which have been carefully read. It is significant that none of this testimony is in any respect contradicted or shaken. Relator's position here reduces to the mere suggestion that the Court should disbelieve the witnesses' denials and accept the inferences relator draws from the existence of the Attorney General's program

and the practice of notification. I find no rational basis for disbelieving the witnesses, and relator's inferences are clearly refuted by the testimony which is fully accepted.

These findings are sustained by the uncontradicted testimony in the record. Unless that testimony is inherently incredible, there is no ground for rejection of the findings as "clearly erroneous." In the discussion which follows we urge that the overriding premises on which the trial court's findings were reversed are untenable.

B. *The Testimony of the Board Members, Found Credible by the Fact-Finding Judge, Should Not Have Been Rejected on the Basis of a "Presumption of Bias" or Questionable Psychological Assumptions.*

The five Board members who testified firmly and certainly that their decision in this case was their own are seasoned and responsible officers. Each has served for many years, under successive Attorneys General, in a judicial capacity the importance and seriousness of which require no elaboration here. Chairman Finucane, who served on the Labor Department's Board of Review when immigration matters were handled there, has been a member of the Board of Immigration Appeals since its creation in 1940 and Chairman since July of 1942. Member Nettleton, who was also on Labor's Board of Review (from 1933 to 1940), has been a member of the present Board since August 1942. Members

Charles, Ludwig, and Wilson have served, respectively, since October 1940, July 1946, and July 1948.

We suggest that the sworn testimony of officers with such backgrounds carries considerable weight when they declare, as each of these did, that their decision in this case, as in others, was uninfluenced by the Attorney General's program. These are not casual, *ad hoc* adjudicators. They are persons for whom judging has been the daily business of long years—sensitive to subtle pressures as well as blunt forces affecting the decisional process. So it is significant that not one word of their testimony, but only speculation, supports the conclusion that their decision in respondent's case was influenced or prejudged by the Attorney General.

The long experience of these Board members is significant, too, in the assurance it adds to the usual presumption of official regularity. Fixed habits of proceeding in accordance with controlling regulations are not dissipated by supposed hints in the newspapers while the regulations remain untouched by the authority who promulgated them. This point is of peculiar interest here, where, as we have observed, respondent's case rests at once on a right he claims from the regulations and on a presumption that the Board must have violated the regulations.

Against these briefly sketched considerations fortifying the testimony and the findings the District Court predicated upon it, Judge Clark's concurring opinion adduced a "presumption of bias" from the facts "that there was a list as alleged, that [re-

spondent] was on it, and that this fact was known to the Board" (R. 214). Insofar as this conclusion is thought to follow as matter of law from this Court's mandate, we believe it to be an erroneous construction of the Court's opinion—for the reasons stated in Point I, *supra*. If Judge Clark meant, however, that the admitted facts lead inevitably to a commonsense inference of bias, that "factual" conclusion is subject to infirmities even more severe than Judge Frank's fuller analysis. The kind of specific and detailed evidence the record now contains cannot be dispensed with on a vague and unsupported "presumption" that the Board, knowing of the program, must inevitably have departed from the regulations calling for exercise of its discretion.

We turn to an examination of Judge Frank's opinion, which, in essence, finds that the testimony and the findings based thereon are, according to his views of human nature, inherently incredible. He said (R. 201):

> * * * We accept it as a fact that the Board members *consciously* believed, when they testified, that the Attorney General's statements amounted to no more than a calendar order (i.e., a direction to give preference, merely in point of time, to consideration and decision of such cases), and that, beyond that, those statements did not have any effect on the Board's decisions. But it is incredible, human nature being what it normally is, that the At-

> torney General's statements—as interpreted by the Supreme Court and the former Attorney General—did not *unconsciously* influence the Board members so that they felt obliged not to exercise their discretion and, without doing so, to decide against Accardi. Any other finding involves reliance on so remarkable a degree of improbability as to be untenable.

Judge Frank says in effect that no normal human being, faced with the knowledge that his superior had instituted proceedings against a particular alien as undesirable, could possibly have decided, no matter what the evidence, that the alien was not in fact undesirable. On this view of human nature, no government or fairly large business could operate. Administrators in every phase of government and business must rely upon subordinates to inform them that a tentatively expressed opinion has been found to be based on insufficient facts or is otherwise erroneous. If mere expression of opinion by a person in authority were, without more, to create an irrebuttable presumption that those called upon to judge would act in subservience to the supposed wishes of higher authority, then no decision of any judge, short of the Supreme Court, could stand if it were in accord with the announced interests of anyone high in the executive hierarchy, lest the judge have in mind that his advancement to a higher bench depends on executive appointment. Moreover, the thousands of administrative

decisions would become targets for speculative claims of subservient bias.

We do not by any means suggest that the views of Judge Frank are totally unfounded in human experience or that subordinates *never* give advice that flatters by its agreement with the superior's preconceptions rather than guiding by an honest independent judgment. What we oppose is the view that infinitely variable "human nature" operates this way always or so commonly that sworn testimony to the contrary in a given case is "incredible." It is an everyday fact, around which life revolves, that the world is at least partly populated with people who have the stamina and drive, both on the conscious and unconscious level, to make their own decisions freely and to rejoice in that liberty.

More particularly, we deny the validity of Judge Frank's generalization in its application to this case. The regulations governing the Board's deliberations remained unaltered, demanding at all times the benefit of the Board's independent judgment to aid the discretion ultimately confided by Congress in the Attorney General. The Board swears it acted in accordance with the regulations. The whole gamut of experience shows that the assertion cannot be deemed "incredible"—incapable of belief—at all.

It is no more incredible or impossible than the impartiality routinely expected in a whole host of situations where judicial or executive officers

make final decisions following initial actions which could superficially be labelled "prejudgment." It is elementary, for example, that a judge who has found it necessary to be severe in rulings throughout a trial, and perhaps in comment on the evidence, is not thereby disqualified for the discretionary decision as to the extent of the sentence. In the executive area, one seeking a pardon can scarcely contend that his request must be assumed to have been ignored because the executive headed the organization which obtained the sentence and may have enunciated a determination vigorously to prosecute the particular crime. Similarly, the fact that a hearing is "before the same authority which has preferred the charges" does not justify an assumption "in advance that an administrative hearing may not be fairly conducted." *Fahey* v. *Mallonee,* 332 U.S. 245, 256. And an expression of opinion as to the general illegality of a practice does not disqualify a board from deciding a particular case involving such practice. *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683, 700-703. In all such cases, the normal expectation is that those charged with the responsibility of office will act honestly and lawfully. That expectation—the so-called "presumption of regularity" —was held insufficient by this Court to preclude the possibility that the Board members in this case had in fact failed to exercise their discretion. Now, however, in view of their sworn testimony that they behaved properly, the presumption

should certainly be as weighty on the side of believing them as the supposition that they were "unconsciously" impelled to ignore their duty.

The view of human nature expressed by Judge Frank is one which this Court has consistently rejected as a basis for decision, and the uncharted area of the effect of subconscious psychological pressures on which he relies is one in which this Court has consistently refused to roam at large. Thus, as we have noted, this Court has held that general expressions of opinion or the initial determination involved in making a decision to commence an administrative proceeding do not render a board incapable of judging fairly the particular case brought before it for adjudication. *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 700-703; *Fahey* v. *Mallonee*, 332 U.S. 245, 256. It has refused to enter into the area of psychological speculation and impute, on the theory of constructive bias, a dishonest or intimidated point of view to government employee jurors. *Dennis* v. *United States*, 339 U.S. 162; *Frazier* v. *United States*, 335 U.S. 497; *United States* v. *Wood*, 299 U.S. 123. It has rejected inquiries into the psychological factors that enter into a judgment. *United States* v. *Morgan*, 313 U.S. 409, 421-422. The Court has declined to engage in psychological speculation that a jury, with less expertise than an official government board, would not be able to follow instructions given it. It recently said, in *Opper* v. *United States*, 348 U.S. 84, 95:

> To say that the jury might have been confused amounts to nothing more than *an unfounded speculation that the jurors disregarded clear instructions of the court* in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions. [Emphasis added.]

The same refusal to speculate as to such imponderable psychological elements—which cannot be proved and have not shown their right to acceptance—should apply to both the Attorney General and his subordinates. When an Attorney General announces a program as one of expedition, and his subordinates testify that they consider it as such, there is no reason to assume that all parties must have considered it to be something else. When a board states that it feels free to exercise its independent judgment, an appellate court is not warranted in finding, on the basis of its own psychological theories, that there must have been unconscious pressure. Psychology is not yet such an exact science that unconscious compulsions of this type can be singled out and evaluated by an appellate court which has not even seen the witnesses, nor is there reason to believe that psychologists would make that claim. For instance, a sense of personal integrity and pride of decision can be as compelling as the desire to please a superior. It is impossible, in short, to evaluate in portmanteau fashion all the psychological factors which enter into the process

of judgment. We have not yet reached the stage of knowledge in which we can summarily assume that when responsible government officials testify that they exercised their independent judgment, they did not do just that; that when their superior testifies that he intended them to exercise their independent judgment, he did not mean what he said. In a government run by human beings, we have as yet no general dispensation to disregard the solemn word of responsible officers, whose integrity has not been impeached, that they honestly tried to judge a case before them impartially.

The impossibility of properly evaluating the speculative psychological factors on which Judge Frank bases his decision renders inapposite the array of cases which he cites. Views of human nature hardly have the fixed content of the contemporaneous documentary evidence upon which this Court reversed the findings of fact in *United States* v. *Gypsum Co.*, 333 U.S. 364. Cases where findings have been reversed for physical impossibility [9] or objective factual improbability [10] are clearly very

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[9] *E.g.*, *Smith* v. *Davis*, 34 Fed. 783, 784 (N.D. Ill.) (a claimed earlier patented device did not have the requisite number of electrodes); *The El Dorado*, 27 Fed. 762, 763 (S.D. N.Y.) (impossibility of a ship's propeller blade being in motion at the time of collision established by physical evidence of the prints made in the side of the colliding ship); *Curley* v. *Missouri Pac. Ry. Co.*, 104 Mo. 211 (claimed injuries from the bumpers of freight-cars at a certain point on thigh not possible to human stature).

[10] *E.g.*, *Quock Ting* v. *United States*, 140 U. S. 417, where a Chinese boy of 16, claiming birth and residence in the United States for the first 10 years of his life, was discredited by his lack of any knowledge of English and his failure to testify to any incident or circumstances of his life in the United States.

different from the situation presented here. Nor is this a case, like many of those cited,[11] where there is contradictory testimony outweighing an improbable claim. It is not impossible or even improbable that a group of subordinates would feel free to tell the Attorney General, in effect, that his preliminary opinion was not supported by the evidence.

Even less apposite are the cases cited by Judge Frank dealing with the possible bias of interested witnesses. In not a single one of such cases was the fact-finding tribunal reversed upon any assumption that the witness' testimony could not support a finding. The point in each case was merely that the interested witness' testimony would not outweigh the outright contradiction by other witnesses or by objective facts. Moreover, the contravening facts were of a directness not remotely approximated by the theorizing below as to what the general pronouncements of the Attorney General called for, or what inwardly motivated the members of the Board.[12] None of the cited cases

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[11] For example, in *Fire Ass'n of Philadelphia* v. *Weathered*, 54 F. 2d 779 (C.A. 5), recovery under a fire insurance policy was dependent upon the house being occupied. The claimant produced a witness who testified that he stayed in the house at the claimant's request during the 24 nights involved, sleeping on a cot and putting the cot and bedclothes away in a certain closet each morning, and using a flashlight for illumination. The testimony was specifically contradicted by testimony that there was no such closet. Moreover, a witness who had been inside the house several times, and various neighbors, testified that they had observed no sign of the alleged occupancy.

[12] A number of the cases cited involved direct financial interest. *Grant* v. *Bradstreet*, 87 Me. 583, 609; *Fisler* v. *Porch*, 10 N. J. Eq. 243, 255; *Vreeland* v. *Vreeland*, 48 N. J. Eq. 56;

supports reversal of a quasi-judicial decision on the basis of such psychological speculation as that announced in the decision below.[13]

Hunter v. *Wetsell*, 84 N. Y. 549; *Crouch* v. *Hooper*, 16 Beav. 182, 185, 51 Eng. Rep. 747.

The remaining citations as to the possible errors of witnesses embody numerous instances of an intense degree of non-financial interest on the part of witnesses, combined with definite, unarguable inconsistencies in the testimony itself or in the factual situation.

[13] Judge Frank's citations to Moore, *Facts* (R. 202, n. 4h, n. 4j, 203, n. 4k, n. 4r) fail to take account of the cautions expressed by that author. Thus, at Section 93 (1908 ed., Vol. 1, p. 139), Moore discusses "abstract improbabilities" but cautions (*id.*, pp. 139-140):

> * * * It is doubtful whether any of the courts intend by this locution to sanction the rejection of testimony abstractly improbable. It would be a monstrous proposition that an improbable fact cannot be established in a court of justice. * * *
>
> * * * It cannot be arbitrarily disregarded by either court or jury, for reasons resting wholly in their own minds, and not based upon anything appearing on the trial. * * * Facts attested by the oath of credible witnesses must stand even in the face of a clear and forcible argument, that, judging by the ordinary course of business affairs, the fact should have been different from what it is sworn to be. It has been said that "there is no limit to the eccentricities of men," and that testimony should not be disbelieved solely because it "borders on the incredible." Certainly a jury is at liberty to believe facts which witnesses testify to, even if they would be considered highly improbable without such testimony. * * *

Similarly, the citation of Section 137 is to be read with its caution (1908 ed., Vol. 1, pp. 183-184):

> * * * [A]bstract improbability does not alone justify disbelief in the positive testimony of credible witnesses, and * * * the improbability which authorizes the trier of facts to withhold belief must be found somewhere in the evidence in the very case in hand. * * *

With the quoted generality that proof must be strong in proportion to the improbability of what is proved (Moore, *Facts*,

There is ample authority, among the very cases cited by Judge Frank, which helps to demonstrate the error of reversing the District Court's findings in this case. In *United States* v. *Oregon Med. Soc.*, 343 U. S. 326, this Court refused to set aside as clearly erroneous the District Court's findings that the defendant medical societies were not monopolizing prepaid medical care. At least in the forum of psychological theory, it seemed arguable that the District Judge was unconsciously, or even consciously, motivated by views he published as notes to his decision, indicating *inter alia* (1) that antitrust prosecutions were in general dubious as expressions of "the economic and social views of those in power" at any given time; (2) that the case was "an attack on the professions," reflecting a doctrine of "World Revolution" which "allows no place for the professions"; (3) that the defendants were really only defending against the threat of "socialized medicine"; and (4) that the next step, if the threat was not stoutly met here, would be "socialized law." See 95 F. Supp. at 107 *et seq.* Characterizing these as "irrelevant soliloquies," this Court rejected the suggestion of bias the Government predicated upon them (343 U. S. at 338), and concluded (p. 339):

1908 ed., § 32) we have no quarrel, but we find nothing in the quoted section or its examples to indicate that the type of improbability there referred to is to be found in an assumption that a board nominated by an Attorney General is not to be believed in its uncontradicted and clear statement of its interpretation of a press release and notification by the Attorney General, and in its claim of conduct in accord with its duty.

> * * * [T]he record does not leave us with any "definite and firm conviction that a mistake has been committed."
>
> As was aptly stated by the New York Court of Appeals, although in a case of a rather different substantive nature: "Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. * * * How can we say the judge is wrong? We never saw the witnesses. * * * To the sophistication and sagacity of the trial judge the law confides the duty of appraisal." *Boyd* v. *Boyd*, 252 N. Y. 422, 429, 169 N. E. 632, 634. [14]

Again, only recently, in *McAllister* v. *United States*, 348 U. S. 19, the Court reversed the Court of Appeals for the Second Circuit for overriding a District Court finding which was surely within an area of high debatability. In that case, the District Court had found negligence in certain conduct aboard a vessel asserted to have led to plaintiff's contraction of polio. This Court reinstated the District Court's finding despite the obvious impossibility of any absolute determination of the cause of the disease, stating (p. 22) that upon the "bal-

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[14] It bears emphasis that in this case the Chairman, the best informed member of the Board, testified in person and was extensively interrogated by the trial judge.

ance of the probabilities" the District Court's inference was a reasonable one.

We recognize, of course, that precedents on factual determinations serve to chart a general course, rather than to diagram the result in a particular case. We believe, however, that the generalities invoked below as a basis for reversing the District Court exceed the scope of proper appellate review and are, even as a factual matter, highly questionable in themselves. Contrary to the court below, we submit that there is nothing in the pronouncements of the former Attorney General which renders improbable his testimony (confirmed by the present Attorney General, see fn. 2, *supra*, pp. 13-14) that he intended the program as one of expedition in prosecution and not as a directive or hint to those charged with responsibilities for adjudication. There is nothing inherently "incredible" in the testimony of the Board members that they so interpreted the program and that they exercised their own discretion in each program case that came before them. Even if, as this Court has hitherto declined to do, a court may profitably engage in speculative appraisals of the type considered by Judge Frank in probing the mental process of adjudication, such reflections hardly warrant sweeping into the discard the testimony of the Board members in this case that they exercised their independent judgment and decided on the record before them. The District Judge, who heard and questioned the Chairman of the Board, and weighed the other testimony in the record, gave every evidence that he

was bringing to bear the wisdom and knowledge which is automatically assumed, until disproved, in all such deliberations. He found the testimony wholly credible. The appellate judge was not justified in overruling that finding.[15]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

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MARCH 1955.

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[15] If, as we believe, Judge Clark's opinion rests solely on his interpretation of this Court's prior opinion (see *supra*, pp. 13-14, 24, 37-38), Judge Frank alone overruled the trial judge's findings. Judge Harlan, on the other hand, upheld those findings.

APPENDIX

Section 19(c) of the Immigration Act of 1917, as amended, 8 U. S. C. (Supp. V, 1946 ed.) 155(c), provided in pertinent part:

> In the case of any alien (other than one to whom subsection (d) of this section is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act. If the deportation of any alien is suspended under the provisions of this subsection for more than six months, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. These reports shall be submitted on

the 1st and 15th day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If prior to the close of the session of the Congress next following the session at which a case is reported, the Congress does not pass such a concurrent resolution, the Attorney General shall thereupon deport such alien in the manner provided by law. * * * Upon the cancellation of such proceedings in any case in which fee has been paid the Commissioner shall record the alien's admission for permanent residence as of the date of his last entry into the United States and the Secretary of State shall, if the alien was a quota immigrant at the time of entry and was not charged to the appropriate quota, reduce by one the immigration quota of the country of the alien's nationality as defined in section 12 of the Act of May 26, 1924 (U. S. C., title 8, sec. 212) for the fiscal year then current at the time of cancellation or the next following year in which a quota is available: *Provided*, That no quota shall be reduced by more than 50 per centum in any fiscal year.

8 C. F. R. (1951 Supp.) 150 provided in pertinent part:

§ 150.7 *Application, prior to hearing, for suspension of deportation*—(a) *Who may apply.* Any alien against whom warrant proceedings have been instituted who believes himself entitled to suspension of deportation may apply therefor prior to hearing * * *.

§ 150.9 *Evidence; burden of proof.* All evidence adduced during this special procedure may be used in any other proceeding and the alien shall be duly informed of this fact. The burden of proof shall be upon the applicant. In presenting his proof he shall be entitled to the benefit of any disclosable records concerning him which are in the custody of the Service.

8 C. F. R. (1951 Supp.) 151 provided in pertinent part:

§ 151.3 *Contents of record; evidence.* * * *

* * * * *

(e) *Application for discretionary relief.* At any time during the hearing under the warrant of arrest the alien may apply for suspension of deportation, or for the privilege of departing from the United States at his own expense in lieu of deportation, or for the privilege of departing from the United States at his own expense in lieu of deportation with the additional privilege of preexamination. He may

apply in the alternative for more than one of these three forms of relief. The burden of establishing that the alien meets the statutory requirements precedent to the exercise of discretionary relief shall be upon the alien. In addition, he may submit any written or oral material which he believes should be considered in the exercise of discretion by the Commissioner.

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No. 616

In the Supreme Court of the United States

OCTOBER TERM, 1954

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK DISTRICT, DEPARTMENT OF JUSTICE, PETITIONER

v.

UNITED STATES EX REL. JOSEPH ACCARDI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In our brief filed when this case was here for the first time, we pointed out that hearing officers and the Board of Immigration Appeals had taken favorable action in cases involving aliens under the Attorney General's program. Brief for Respondent, No. 336, O. T. 1953, pp. 35–36. In our main brief now (p. 34), we have referred back to the cases then cited, urging that such instances lend support to the District Court's finding that the Board, as its members all testi-

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fied, exercised the independent judgment required by the regulations.

Respondent (Br. 22–23) finds this argument "completely refuted by the Chairman of the Board who stated that in all program cases the aliens had been directed to leave the country. (R. 119–120)." He insists (Br. 30) that, despite the uniform testimony to the contrary, this case, because it was under the program, must be viewed as one "where the agency head finally resolved the merits of a case before the matter was heard by his subordinates."

We believe, however, that the decisions to which we have referred (and we confine this discussion to such cases) add to the demonstration that respondent's assertion, rejected by the District Court, is unwarranted. The decisions show, even in cases where the ruling has been unfavorable to the alien, a pattern of careful, thorough, judicious consideration prior to the final determination. They argue eloquently against the *a priori* assumption that cases of this type could not have been fairly heard, despite the sworn testimony of the hearers that they were.

In two cases under the program, both cited in our brief last year when decisions favorable to the aliens had been rendered by special inquiry officers (Resp. Br., No. 366, O. T. 1953, p. 35, fn. 8), final decisions of non-deportability have now been rendered by the Board. *Matter of M——*, Imm. File No. E-076873 (February 11,

1954); *Matter of R——*, Imm. File No. A-4656075 (December 14, 1954). In the first of these, both the Special Inquiry Officer and the Board concluded that the respondent, a naturalized citizen, had overcome a presumption of expatriation from extended foreign residence and was therefore still a citizen and, of course, non-deportable. The Inquiry Officer's decision and the Board's brief affirmance, both rendered before this Court's decision a year ago in the instant proceedings, are reproduced as Case No. I in the Appendix to this brief.[1]

In the second of the foregoing cases, *Matter of R——*, the Special Inquiry Officer had held before last year's decision by this Court, that the alien involved was non-deportable, concluding, *inter alia*, that the violation of the Mann Act there involved did not constitute a crime involving moral turpitude within the meaning of the provision making such crimes a basis for deportation. Thereafter, in a ruling vigorously contested by the Immigration Service, the Board affirmed this decision. (Case No. II, Appendix, *infra*.)

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[1] As respondent states (Br. 23), the Chairman of the Board testified that a check had been made for him and that he knew of no cases under the program in which the final order had not required voluntary departure or compulsory deportation (R. 120). However, the Chairman had also pointed out that the Board kept no special records of such cases (R. 119), and the actual fact, officially recorded, is that the check on which he based his testimony overlooked the case cited above.

APPENDIX

This result could fairly be called debatable. Cf. *Jordan* v. *De George*, 341 U. S. 223. Surely, the Inquiry Officer and the Board, had they felt, in respondent's words (Br. 30), that "the agency head [had] finally resolved the merits", could have found turpitude in a statute defining the conduct it forbids in terms such as "debauchery" or "immoral purpose." 18 U. S. C. 2421.

We referred last year to two other decisions, in which the Board had affirmed orders granting the aliens the privilege of voluntary departure (Resp. Br., No. 366, O. T. 1953, p. 35, fn. 9). To be sure, such relief falls considerably short of the alien's hope to remain in this country. It is to be noted, nevertheless, that Congress authorized it as a matter of special, discretionary favor, and that it entails potentially substantial benefit. An alien who is arrested and deported is thereafter ineligible for a visa unless the Attorney General consents to his application for readmission. Immigration and Nationality Act of 1952, Sec. 212 (a) (17), 66 Stat. 182, 8 U. S. C. 1182 (a) (17); and see, to the same effect, 45 Stat. 1551, 8 U. S. C., 1946 ed., 180 (a). It is clear, then, that there is a sound reason for the efforts of many deportable aliens to be permitted to depart voluntarily and that the grant of such relief is not to be dismissed as insignificant.

Finally, we mentioned last year four cases in which, following orders for deportation, the Board had ordered reopening to consider further

applications for suspension or to permit the filing of such applications. Bringing these cases up to date, three have ultimately resulted in final orders for deportation.[1] In the fourth (*Matter of B———*, Imm. File No. A-2544646), the Board authorized suspension of deportation on March 8, 1955, but on motion of the Immigration Service, alleging the existence of evidence which showed that the alien was neither eligible for relief under the statute nor worthy of relief if eligible, the Board ordered the case reopened on April 6, 1955. We print as Case No. III in the Appendix the decision of the Special Inquiry Officer denying suspension after the Board's initial order reopening to consider such relief (November 15, 1954), the Board's subsequent decision authorizing suspension (March 8, 1955), and the Board's order again reopening the case on motion of the Service (April 6, 1955).

While none of these last four cases has finally resulted (so far at least) in action favorable to the alien, all reflect sober, careful, unhurried judgments on the merits. Even the much discussed matter of "expedition," while it may have meant careful scrutiny of requests for postponements and avoidance of unnecessary delay, has not

[1] *Matter of F———*, Imm. File No. E-062511 (appeal to Board dismissed August 2, 1954); *Matter of C———*, Imm. File No. E-051721 (appeal to Board dismissed October 28, 1954); *Matter of M———*, Imm. File No. A-3436560 (appeal to Board dismissed October 20, 1954).

meant—and the instant case itself illustrates this—hasty or merely *pro forma* decisions.

It remains important, we think, that the claim respondent presses is for executive clemency, left by Congress to the discretion of the Attorney General, with a Congressional veto reserved only over decisions favorable to the alien. But apart from this, and recognizing fully that respondent was entitled under the Attorney General's regulations to the Board's independent judgment on this matter, the record in this case wholly justified the District Court's finding that the requirement was met. The materials in this reply brief, confined to cases which had already been mentioned, supply concrete illustrations of the Board's exercise of painstakingly sober judgment in other so-called program cases. The sworn testimony of the Board members shows that they exercised such judgment in the case of Accardi, whose claim for special relief was on its face an unappealing one. The finding of the District Court that they were telling the truth, and that their statements accurately portrayed the process of their decision, is a fair and sensible appraisal of the evidence. Rejection of that finding as "clearly erroneous" has turned on a kind of presumption of frailty and deviousness—on an assumption that the Board members *must have* believed the Attorney General was hinting to them through press releases not to do what his regulations said, even though the regulations were

his to change and their decisions subject to reversal by him. This assumption is neither attractive nor compelling. It cannot justify reversal of the District Court's finding that respondent had failed to prove his allegation of prejudgment.

Respectfully submitted.

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APRIL 1955.

APPENDIX

Case No. I

MATTER OF M------, IMM. FILE NO. E-076873

A. DECISION OF SPECIAL INQUIRY OFFICER

Discussion: This record relates to a 62 year old married male, a native of Italy, who testified that he is a citizen of the United States by naturalization. He presented Certificate of Naturalization showing that he was naturalized at a regular term of the District Court of the United States at Cleveland, Ohio, on March 18, 1920, under the provisions of Section 4, Sub-Division 7 of the Act of May 9, 1918.

The respondent testified that he has been living in Mexico for the past sixteen or seventeen years; that he first entered Mexico in November, 1933 and that after a short stay there he returned to the United States; that in 1934 he went back to Mexico and that he has been living in Mexico for most of the time since 1935. He stated that he has been a legal resident of Mexico since April 13, 1942 and has lived there continuously from that date until April 10, 1953, with the exception of periodic visits to the United States. He stated that he last entered this country at San Antonio, Texas on April 10, 1953, being admitted at that time as a citizen of the United States. Such admission has been verified (Exhibit 17).

There was entered into evidence as Exhibit 3,

a photostatic copy of a Tourist Permit No. 234410 issued on January 16, 1935 in Cleveland, Ohio, to one Frank Milano, establishing that he entered Mexico on January 20, 1935. The respondent identified the aforementioned document as relating to him. The following listed photostatic copies of documents in the Spanish language, with English translations thereof, which respondent identified as relating to him, were also made part of the record as indicated:

Exhibit 4—Letter from the respondent, dated February 27, 1935, to the Mexican Immigration Service, requesting that his migratory status be adjusted.

Exhibit 5—Letter from the Mexican Immigration Service, dated March 16, 1935, to the respondent granting him the status of conditional immigrant for one year.

Exhibit 6—Letter from respondent, dated March 16, 1936, requesting the Mexican Immigration Service to authorize a year's extension of his status or, if possible, to grant him the status of permanent resident.

Exhibit 7—Letter from the Mexican Immigration Service to respondent, dated March 30, 1936, granting one year's extension of his permit to reside in Mexico.

Exhibit 8—Letter from respondent to the Mexican Immigration Service, dated March 1, 1937, requesting a year's extension of his status.

Exhibit 9—Letter from the Mexican Immigration Service to respondent, dated March 18, 1937, granting one year's extension of his residence in Mexico.

Exhibit 10—Letter from respondent to the Mexican Immigration Service, dated

February 10, 1938, requesting a year's extension of his residence in Mexico.

Exhibit 11—Letter, dated March 17, 1938, from the Mexican Immigration Service to the respondent granting him one year's extension of his permit to reside in Mexico.

Exhibit 12—Letter from respondent, dated January 20, 1939, to the Mexican Immigration Service, requesting an extension of his status for one year.

Exhibit 13—Letter, dated February 15, 1939, from the Mexican Immigration Service to respondent granting him permission to reside in Mexico for the fifth consecutive year.

Exhibit 14—Letter from the Chief of the Mexican Immigration Service to the Officer in Charge of that Service at Nuevo Laredo, dated February 15, 1940, instructing that the respondent be allowed to depart and reenter Mexico at that Port while his migratory status is in the process of being adjusted. This document bears the signature of the respondent on the margin.

Exhibit 15—Letter from the respondent, dated at Mexico City, Mexico, February 27, 1940, to the Mexican Immigration Service, requesting that two bonds posted by him in 1935 be returned, inasmuch as one of them was no longer necessary because he had posted a new bond.

Exhibit 16—Letter from the respondent, dated May 14, 1951, to the Mexican Foreign Office stating that he had not bought property for which he was granted permission in 1951 and requesting new permission to buy two pieces of land in the State of Vera Cruz. In this document the respondent identified himself as a United States citizen, a legal resident of Mexico since

> April 13, 1942, and agrees to consider himself as a Mexican, insofar as rights to and income from certain property are concerned and also agrees not to invoke any protection from his Government in these matters.

It is concluded that Exhibits 3 to 16 inclusive, together with the testimony of the respondent that he has been living in Mexico since 1935, establishes that the respondent's place of abode was in Mexico from at least January 20, 1935, until he last entered the United States on April 10, 1953.

The question at issue in this case is whether the respondent, by reason of his residence in Mexico or by the commission of any overt act, has expatriated himself under the provisions of the second paragraph of Section 2 of the Act of March 2, 1907, or Statutes enacted subsequent thereto, namely: The Nationality Act of 1940 and the Immigration and Nationality Act.

Under the provisions of the second paragraph of Section 2 of the Act of March 2, 1907, a naturalized citizen of the United States who resided for two years in the foreign state from which he came or for five years in any other foreign state, became subject to a presumption that he had ceased to be a citizen of the United States. That provision was repealed by Section 504 of the Nationality Act of 1940. However, the presumption of cessation of the citizenship of naturalized citizens of the United States who resided continuously for five years in any other state was continued in force, in certain cases, until October 16, 1946, under the provisions of Section 404 (c)

of the Nationality Act of 1940. It has been held that the above-mentioned provisions of Section 2 of the Act of 1907 may operate to terminate citizenship status and in order to overcome the presumption it must be made to appear that there has not been an abandonment of intention to remain a citizen of the United States (1. I&N Dec. 398.563).

The respondent testified that he never at any time intended to make his permanent home in Mexico; that he always considered his principal place of residence to be with his family in the United States and that his only purpose in acquiring the status of a legal resident under the Mexican laws was to enable him to hold property and make investments in Mexico, because under Mexican law foreigners are not allowed to operate a business or buy land there unless such person becomes a resident of Mexico. He testified that he had never voted, held public office, or subscribed to any oath in Mexico and had never been employed by the Government of Mexico in any capacity. He stated that he has property and investments in Mexico worth between $50,000.00 and $75,000.00, which he intends to sell before returning to live in the United States and has not filed an income tax return in this country since 1935, because he had no earnings here, but that in 1953 he filed for a gift tax in connection with a gift of $70,000.00 he made to his wife to enable her to purchase property in the form of a parking lot in Los Angeles, California, from which she derives an income of $350.00 per month.

The respondent testified that although his wife has visited him in Mexico since 1935 on a number

of occasions, she has always resided in the United States; that from 1935 to 1936 she resided in Lyndhurst, Ohio and since 1936 she has resided at Akron, Ohio in a home owned by her. He stated that his four children, all between 15 and 21 years old were born in the United States and have always lived in the United States; that his two younger children were born while he was in Mexico and that he had supported his family and educated his children in the United States.

The respondent testified that during the time he has been in Mexico he registered as a United States citizen on two occasions, the first time with the American Consul at Port Mexico, Vera Cruz, during 1944 and again with the American Consul at Vera Cruz, Mexico on December 12, 1945. He presented an American Foreign Service Form 225–B, "Card for Identification for use on the Mexican Border", issued to him by the American Consul at Vera Cruz, Mexico, upon respondent's allegation, under oath, that he was a citizen of the United States, granting the respondent permission under the Act of May 22, 1918, as amended by the Act of June 21, 1941, to depart from and reenter the United States upon presentation of the certificate to an American Immigrant Inspector at any Port on the Mexican Border between December 12, 1945 and October 14, 1946, subject to such restrictions as the Secretary of State may prescribe. The respondent testified that between January 20, 1935 and February 29, 1940 he visited the United States many times and since 1942 he has visited this country every year, except for one or two years. He stated that since 1935 he has traveled

with a United States Passport, which he presented whenever he entered this country from Mexico. He is presently the holder of a United States Passport, No. 471893, issued to him at Washington, D. C., on June 28, 1951. Exhibit 22 consists of photostatic copies of documents in the Spanish language, with English translation thereof, which relate to the respondent, corroborating his testimony as to the frequency of his visits to the United States.

The respondent further testified that he has been a dues paying member of the American Legion, Wilkie Post 19, at Akron, Ohio. He presented a Certificate of Registration, showing that he was duly registered under the Selective Service and Training Act of 1940 on November 5, 1942 with Local Board No. 8, Summit County, Ohio, at which time he gave his address as 505 North Hawkins Avenue, Akron, Ohio. He also presented a permit from his Local Board, granting him permission to depart from the United States to Mexico for six months. The respondent stated that his Local Board informed him that on account of his age he did not need any further permits. He stated that during the summer of 1952, while in the United States, he registered to vote and did vote in the last Presidential Election by means of an absentee ballot. Exhibit 21 is a Voting Record from the Summit County, Ohio Board of Elections, indicating that Frank Milano, 375 North Hawkins Avenue, Akron, Ohio, registered on August 27, 1952 and voted the same year.

According to the evidence of record the respondent's only reason in acquiring residence in

Mexico was to enable him to make investments and buy property in Mexico in compliance with the laws of that country. During his entire residence in Mexico, the respondent's wife and family, to whom he furnished support, resided continuously in the United States. He maintains that he never, at any time, had any intention of making his permanent home in Mexico; that he always considered his home to be with his family in the United States; and that it was always his intention to return to them. He has made periodic trips to the United States since 1935, on which occasions he stated he was in possession of a United States Passport. His last United States Passport, still in his possession, was issued to him at Washington, D. C., on June 28, 1951. He registered with the American Consul in Mexico, as a citizen of the United States, during 1944 and on December 12, 1945.

It is the view of the Department of State that a naturalized citizen of the United States did not lose his citizenship as a result of failure to rebut the presumption of loss under the provisions of the second paragraph of Section 2 of the Act of March 2, 1907, and that the statutory provision of that Section related only to the question whether diplomatic protection should be extended to naturalized citizens after five years residence in a foreign state other than that from which they came (Hackworth, 3 H. Digest of International Law, Vol. III, pp. 289-297). This position is in accord with the opinion of Attorney General Wickersham in 1910 (28 Op. Atty. Gen. 504 (1910)), also by many decisions of the courts (Camardo v. Tillinghast, 29 F. 2d 527 (C. C. A. 1,

1928); *U. S.* v. *Eliasen*, 11 F. 2d 785 (D. C. Wash. 1926)). The Board of Immigration Appeals in several unreported decisions has also adopted the same view. It is concluded upon the basis of all the evidence of record and the above-cited authorities that the respondent has overcome the presumption of loss of citizenship under the provisions of the second paragraph of Section 2 of the Act of March 2, 1907.

As previously stated, the Act of March 2, 1907 was repealed by Section 504 of the Nationality Act of 1940, effective January 14, 1941. Section 404 (c) of that Act states that a naturalized citizen of the United States shall lose his nationality by residing continuously for five years in any foreign state except as provided in Section 406. However, Section 409 of the Nationality Act continued the presumption of loss of nationality under Section 404 (c) of the Act, as well as under the second paragraph of Section 2 of the Act of 1907 until October 16, 1946.

Section 406 of the Nationality Act, as amended by the Act of December 24, 1942 (56 Stat. 1085: 8 U. S. C. 806) which added subsection (h) to Section 406, provides that Section 404 (c) of the Nationality Act of 1940 shall have no application to a person who is a veteran of the Spanish American War or of the World War, his wife, minor children or dependent parents. The Nationality Act of 1940 was repealed by Section 403 of the Immigration and Nationality Act, effective December 24, 1952. The latter Act also contains the provision for loss of citizenship by a naturalized citizen of the United States upon five years residence in a foreign state other than

that of which he was formerly a national or in which he was born (Sec. 352 (a) (2)) and also exempts World War Veterans from the loss of nationality by reason of such foreign residence whether before or after the effective date of that Act.

The respondent testified that he enlisted in the United States Army in May, 1918 and was honorably discharged. He has presented his Honorable Discharge from the United States Army, a photostatic copy of which was entered into evidence as Exhibit 18, showing that he was honorably discharged at Camp Sherman, Ohio on August 13, 1919. In view of the foregoing, it is concluded that the respondent did not lose his nationality under the provisions of the Nationality Act of 1940 or the Immigration and Nationality Act, and that he is still a citizen of the United States. It has already been concluded that he has overcome the presumption of loss of citizenship under the Act of March 2, 1907. Accordingly, the charge of deportability contained in the warrant of arrest is not sustained.

In view of the foregoing, it is deemed that any discussion of other factors in this case is unnecessary.

Findings of fact: Upon the basis of all the evidence presented, it is found:

1. That the respondent, a native of Italy, became a citizen of the United States by naturalization at Cleveland, Ohio on March 18, 1920 under the provisions of Section 4, Sub Division 7, of the Act of May 9, 1918.

2. That the respondent last entered the United States at San Antonio, Texas on

April 10, 1953, on which occasion he was admitted as a citizen of the United States.

3. That the respondent is the holder of a United States Passport, No. 471803, issued to him at Washington, D. C., on June 28, 1951.

4. That the responded resided in Mexico from January 20, 1935 until April 10, 1953.

5. That the respondent went to Mexico in order to make investments and buy land there.

6. That the respondent's wife and family resided in the United States during the entire period of time he was in Mexico.

7. That the respondent made periodic visits to the United States between January 20, 1935 and April 10, 1953.

8. That the respondent, while in Mexico, always intended to return to the United States.

9. That the respondent enlisted in the United States Army on May 26, 1918 and and was honorably discharged therefrom on August 13, 1919.

Conclusions of law: Upon the basis of the foregoing findings of fact, it is concluded:

1. That the respondent has successfully rebutted the presumption of loss of citizenship found in the second paragraph of Section 2 of the Act of March 2, 1907.

2. That the respondent did not lose his nationality of the United States under the provisions of Section 404 (c) of the Nationality Act, he being within one of the exempt categories of Section 406 (h) of that Act.

3. That the respondent did not lose his nationality of the United States under the provisions of Section 352 (a) (2) of the Immigration and Nationality Act, he being

within one of the exempt categories of Section 354 (1) of that Act.

4. That the respondent is *not* subject to deportation in that, at the time of entry, he was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit: Aliens who are immigrants not in possession of a valid immigrant visa, reentry permit, border crossing identification card, or other valid entry document and not exempted from the presentation thereof by said Act or regulations made thereunder.

Order: It is ordered that the proceedings in this case be terminated.

B. DECISION OF BOARD OF IMMIGRATION APPEALS

Upon consideration of the entire record, it is ordered that decision of the special inquiry officer terminating proceedings be and the same is hereby approved.

Case No. II

MATTER OF R——, IMM. FILE No. E–081204

DECISION OF BOARD OF IMMIGRATION APPEALS

The case is before us by certification.

The respondent is a 57-year-old single male, a native and citizen of Italy who has resided in the United States since his lawful admission for permanent residence on June 4, 1914.

The special inquiry officer found the respondent not deportable on either of the grounds stated above and ordered termination of proceedings. The Commissioner of the Immigration and Naturalization Service opposes this action and asks

that the respondent be ordered deported on each of the grounds stated above.

Deportation of the respondent on the first charge is sought under that portion of Section 241 (a) (4) of the Immigration and Nationality Act, 8 U. S. C. A. 1251 (a) (4), which makes deportable an alien "who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of misconduct, * * *." The Service is of the opinion that respondent has been convicted of crimes involving moral turpitude on three occasions. The special inquiry officer found the evidence established conviction of only one such crime—that being the crime summarized after numeral (2) in the caption. It is the one for which respondent was convicted in Pennsylvania in 1926 on two indictments charging four offenses—fraudulent conversion; larceny; receiving stolen goods; and conspiracy to steal. As a result of the conviction, the respondent received a sentence of one year. He served this sentence and thereby received a legislative pardon for the crimes. There is a question as to whether he was convicted for all four offenses, and if not, for which particular offense or offenses. The issue is not important. Even if he had been convicted for all four offenses, it would, for deportation purposes, have been regarded as conviction for one crime since all the offenses were based upon actions arising from a single scheme of misconduct occurring on May 29, 1925, when respondent appropriated $1,800 belonging to Mario Pagni. Conviction for any of the offenses involves moral turpitude.

Counsel is of the opinion that this conviction cannot be the basis for deportation proceedings because of the legislative pardon respondent received after serving his sentence. We have previously considered a similar contention and ruled that while a legislative pardon, under the law previous to the Immigration and Nationality Act of 1952, had been effective to avert deportation, one who held such a pardon and was therefore, prior to the Immigration and Nationality Act, immune from deportation, could nevertheless be deported under the Immigration and Nationality Act which specifically provides that a pardon to avert deportation must be issued by the President of the United States or by the Governor of any of the several States—a provision we have held is retroactive (*Matter of R——*, Int. Dec. 518; 241 (b), Immigration and Nationality Act, 8 U. S. C. A. 1251 (b)).

For the second of the two convictions of crime involving moral turpitude which must be found to exist before an alien is deportable, the Service relies upon a Magistrate's Order in 1924 fining respondent $100 or imprisonment for 60 days in the workhouse in Pittsburgh following an arrest as a suspicious person and "bunco" in Pittsburgh, Pennsylvania, on June 3, 1924. The Service contends that this incident resulted in respondent's conviction for the crime of larceny—the crime set forth after numeral (3) in the caption. The special inquiry officer concluded that the Service had failed to bear its burden of establishing that there had in fact been a conviction

of larceny. The matter has been fully discussed by him on pages 3 and 7 of his order. We concur in his finding. We note also counsel's uncontradicted statement that "bunco" is not a crime in Pennsylvania and that larceny is not a minor offense which may be disposed of summarily by a Magistrate. The matter requires no further discussion. The conviction in question cannot therefore serve as a ground for deportation.

Finally, the Service relies upon respondent's conviction in 1942 for violation of the Mann Act as the second of the two crimes involving moral turpitude which must be found to exist to render respondent subject to deportation. If it be found, as was found by the special inquiry officer, that the conviction does not involve moral turpitude, then it must be concluded that this record establishes the conviction of only one crime involving moral turpitude and the charge based on the criminal grounds must necessarily fail.

The Mann Act conviction occurred on July 30, 1942, when respondent was found guilty of the "offenses" charged in count one of a three count indictment. He was sentenced to six months' imprisonment and fined $1,500. Count one which was based on 18 U. S. C. A. 398, now 2421, charges respondent with aiding and assisting in obtaining transportation and in transporting from New Jersey to Florida, one Louise Abate, "with intent and purpose * * * to induce, entice and compel * * * (her) to engage in an immoral practice, to wit, the practice of illicit sexual intercourse with him, * * *". We must determine

whether this conviction involves moral turpitude. He was found not guilty on counts two and three.[1]

The special inquiry officer held that moral turpitude was not involved in the conviction. He found that the fundamental crime charged was the practice of illicit sexual intercourse between parties whom there was nothing to show were married and that the offense in essence amounted to the commission of fornication, a crime not involving moral turpitude. This Board has previously ruled in a similar manner, in a case not reported and not available to the special inquiry officer (*Matter of K——*, 56137/320 (1944)).

The Service argues that *Matter of K——*, was incorrectly decided. It is argued that the inherent nature of the crime spelled out by the statute is such as to require a finding of moral turpitude in every conviction. The Service theory is based upon the belief that the phrase in the indictment charging the commission of "other immoral practice" (which here the Service equates with "other immoral *purposes*"), requires a finding of action that amounts to more than simple fornication before a conviction can be obtained. In other words, the conduct must be

[1] Count two was laid under 18 U. S. C. A. 399, now 2422. It charged respondent with *persuading* the female in question to pass state lines "for the immoral purpose of illicit sexual intercourse with him." Count three was laid under the same section as was count one and charged the respondent with *causing* the female to be transported "with intent to induce, entice, and compel, the said Louise Abate to engage in the immoral practice of illicit intercourse with him."

in the nature of prostitution, concubinage, seduction, or corruption from virtue to obtain a conviction. Furthermore, it is urged that fornication should be found to be a crime involving moral turpitude.

Counsel argues that the statute, by its inherent nature, does not define a crime necessarily involving moral turpitude; that respondent was not convicted for transporting a woman for purposes of prostitution or commercial vices; and that the specific act of which he was convicted amounts to no more than a conviction for inducing a woman to commit an act or acts of fornication, a crime not involving moral turpitude. Furthermore, counsel urges that the offense is less blameworthy than simple fornication since the gist of the offense was assisting the woman to obtain transportation and it was unnecessary to establish that there had actually been sexual relations.

In view of the Commissioner's urgent representations that the *Matter of K——*, was incorrectly decided, and that the crime in question involves moral turpitude, we shall deal fully with the problem.

In determining whether a crime involves moral turpitude, the courts have given us certain standards which we *must* follow. (*United States ex rel Mylius* v. *Uhl*, 203 Fed. 152, S. D. N. Y., affd. 210 Fed. 860, C. A. 2; *United States ex rel Robinson* v. *Day*, 51 F. 2d 1022, C. A. 2; *United States ex rel Manzella* v. *Zimmerman*, 71 F. Supp. 534, E. D. Pa.; *United States ex rel Teper* v. *Miller*, 87 F. Supp. 285, S. D. N. Y.; *Vidal Y Planes* v. *Landon*, 104 F. Supp. 384 (1952); 37 O. A. G.

293; *Matter of S——*, 2 I&N Dec. 353, 357, 361; *Matter of E——*, 2 I&N Dec. 134, 145.)

The test requires us to first determine what law or specific portion thereof has been violated (*United States ex rel Teper* v. *Miller, supra,* and cases cited there), and then, without regard to the act committed by the alien, to decide whether that *law inherently* involves moral turpitude (*United States ex rel Mylius* v. *Uhl, supra*); that is, whether violation of the law "under any and all circumstances", would involve moral turpitude (*United States* v. *Zimmerman, supra; Matter of S——, supra,* pp. 357, 361; *Matter of E——, supra,* 145). If we find that violation of the law under any and all circumstances involves moral turpitude, then we *must* (*United States ex rel Teper* v. *Miller, supra*) conclude that *all* convictions under that law involved moral turpitude although the "particular acts evidence no immorality" (*United States ex rel Mylius* v. *Uhl, supra*). If, on the other hand, we find that the law punishes acts which do not involve moral turpitude as well as those which do involve moral turpitude, then we *must* rule that *no* conviction under that law involves moral turpitude, although in the particular instance conduct was immoral (*United States ex rel Robinson* v. *Day, supra*).[2]

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[2] The rule set forth exists because a standard must be supplied to administrative agencies; it eliminates the burden of going into the evidence in a case; it eliminates the situation where a nonjudicial agency retries a judicial matter; and it prevents the situation occurring where two people convicted under the same specific law are given different treatment because one indictment may contain a fuller or

To determine what law has been violated, we may peruse the indictment, conviction and sentence (*United States ex rel Teper* v. *Miller, supra*). These documents reveal that respondent was convicted under that portion of 18 U. S. C. A. 398 which reads as follows, except for the matter in parentheses which is a part of the statute, but not found in the indictment.

> Any person who shall knowingly * * * aid or assist in obtaining transportation for, or in transporting, in interstate * * * commerce, * * * any woman or girl * * * with the intent and purpose to induce, entice, or compel such woman or girl (to become a prostitute or to give herself up to debauchery, or) to engage in any other immoral practice * * * shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment of not more than five years, or by both such fine and imprisonment, * * *.

Section 398 of Title 18 U. S. C. A., 1926, sets forth several immoral acts—prostitution, debauchery, other immoral purposes or practices; several ways by which transportation of a female to engage in immoral acts can be effected—aiding in transporting, assisting in transporting, transporting, or causing to be transported; and several intents—to make a female a prostitute, to debauch, to commit an immoral act with her; to induce, entice or compel her, to be a prostitute,

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different description of the same act than the other indictment; and makes for uniform administration of law (*United States ex rel Mylius* v. *Uhl, supra*).

to engage in debauchery, or to commit an immoral act.

Count one sets forth nine ways in which the statute could have been violated. Three acts are charged in the conjunctive as to transportation; and three are charged in the conjunctive as to intent. As to transportation, respondent was charged with, (A) aiding in obtaining transportation, and (B) assisting in obtaining transportation, and (C) transporting in interstate commerce. As to intent, he was charged with (1) inducing, and (2) enticing, and (3) compelling the performance of the immoral act.[1] Any one combination of the lettered acts with those preceded by a numeral would have been sufficient to establish a violation of Sec-

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[1] Respondent is charged in the conjunctive with the commission of acts and the possession of intents set forth in the statute in the disjunctive. Such pleading is proper to avoid an acquittal by reason of any unforeseen lack of harmony between allegations and proof; and proof of the commission of *any one* of the acts and possession of *any one* of the intents is sufficient to obtain conviction. (*Malaga* v. *United States*, 57 F. 2d 822, C. A. 1; *Blain* v. *United States*, 22 F. 2d 393, 395, C. A. 8; *United States* v. *Mellor*, 71 F. Supp. 53, D. Neb., affd. 160 F. 2d 757, C. A. 8, cert. denied, 331 U. S. 848; see also *United States* v. *Brothman*, 93 F. Supp. 924, S. D. N. Y.; *District of Columbia* v. *Hunt*, 163 F. 2d 833, C. A. D. C.; *Fredrick* v. *United States*, 163 F. 2d 536, 544, C. A. 9, cert. denied 332 U. S. 775; *Crain* v. *United States*, 162 U. S. 625, 40 L. ed. 1097.)

Under such an indictment, the charges which are not supported by the evidence need not be submitted to the jury—only such issues as are supported by the evidence should be submitted (*Mellor* v. *United States*, *supra*, 160 F. 2d 757, 763 C. A. 8). We are precluded from going behind the record to determine what issues were presented to the jury (*United States ex rel Teper* v. *Miller*, *supra*).

tion 398, i. e. (A) and (2), aiding in obtaining transportation with intent of enticing the performance of the immoral act would be an offense, etc. (cases cited in footnote 3).

Even though violation of Section 398 could have been accomplished under more than one of the conditions specified in the Act, only one violation results, and one cannot be convicted under Section 398 on two counts charging the same transportation of the same woman in one count for the purpose of prostitution and in the other for the purpose of illicit intercourse. Conviction and punishment can be had on only one count.[4] (*Roark* v. *United States*, 17 F. 2d 570, C. A. 8; *Malaga* v. *United States*, 57 F. 2d 822, C. A. 1; *Caballaro* v. *Hudspeth*, 114 F. 2d 545, C. A. 10; *Blain* v. *United States*, 22 F. 2d 398, C. A. 8; *Mellor* v. *United States, supra; United States* v. *Lewis*, 110 F. 2d 460, 462, C. A. 7, cert. denied 310 U. S. 634. But See *United States* v. *Fleenor*, 177 F. 2d 485, C. A. 7; which does not discuss cases which are apparently contrary; and *Malaga* v. *United States, supra*, which uses language indicating there is more than one offense under Section 398, but which terms a broad indictment similar to that herein as defining one offense. (*United States* v. *Lewis, supra*, 462, and *Mellor* v. *United States, supra*, also characterize an indictment similar to that herein as defining one offense under Section 398.)

It is clear therefore that respondent was convicted of only one offense. What was that of-

[4] There can be conviction for offenses arising out of the same act if there is a violation of Section 398 *and* 399 (*La Page* v. *United States*, 146 F. 2d 536, C. A. 10).

fense? It seems of little moment whether respondent was convicted for the act or acts of (1) aiding in obtaining transportation, or (2) assisting in obtaining transportation, or (3) in transporting the female. However, it might be of importance if he were convicted for planning the immoral act with the intent to *compel*, rather than induce or entice its commission. Whether such a conviction is more culpable in morals than one for *inducing* the performance of the act, we need not decide, for we conclude that the conviction involved must be considered to have been for the offense of transporting a female with the intent to *induce* or *entice* her to engage in the immoral practice represented by illicit intercourse. We reason as follows.

Legally, the count on which respondent was indicted creates only one offense. The offense could have been committed by any *one* of the nine acts set forth in the count. It was necessary to find only the existence of one act to obtain a conviction. The jury rendered a general verdict of guilty. We cannot go behind the record to determine what specific issues were presented to the jury and what specific act or acts they found to exist (*United States ex rel Teper* v. *Miller, supra*). Since the verdict was a general one and did not specify the act or acts on which it rested, it cannot be determined that respondent was not convicted for the acts which do not relate to compelling (*Stromberg* v. *California*, 283 U. S. 359, 367–370, 75 L. ed 1117; *Terminiello* v. *Chicago*, 337 U. S. 15, 93 L. ed. 1131). The finding that respondent was guilty of the "offenses" on count one, was of course surplusage,

for there is only one offense. (Even if this finding could be given weight, it is meaningless for the purposes of this discussion, for it may have referred to any two or more of the six acts set forth which do not involve the intent "to compel".) Compulsion is not a material element of the crime (cases cited *infra*). The burden of establishing that conviction was for a particular act is upon the Government. On this record it cannot be found that the transportation was for "compelling" the woman to engage in unlawful sexual intercourse. Because of these facts, we are not justified in drawing the inference most unfavorable to the alien. We must in fact draw that most favorable to him. We must assume that he was convicted for transportation for the purpose of inducing or enticing the commission of the act.

Does the crime we have defined in this case inherently involve moral turpitude? If we find that situations not involving moral turpitude are punishable by the phrases with which we are concerned, then it becomes our duty to find that the crime defined does not involve moral turpitude (*Matter of S——*, 2 I&N Dec. 361).

While the primary purpose of the Mann Act was to deal with white slavery, the statute "enumerates the prohibited acts in broad language capable of application beyond that indicated by the legislative framers" (*Mortenson* v. *United States*, 322 U. S. 369, 377, 88 L. ed. 1331). There can therefore be conviction where the elements of commercial vice or pecuniary motive are absent (*Caminetti* v. *United States*, 242 U. S. 470, 61 L. ed. 442; *United States* v. *Reginelli*, 133

F. 2d 595, C. A. 3, cert. denied, 318 U. S. 783). The offense is completed at the moment of transportation across state lines, the necessary intent or purpose being present (*Neff* v. *United States*, 105 F. 2d 688, C. A. 8). It is not necessary that the immoral act be completed or attempted (*United States* v. *Brand*, 229 Fed. 847, S. D. N. Y.). It is not necessary to establish that the female was seduced from virtue; that she was corrupted; or that she has been previously chaste. The statute is not an anti-seductive one and it only incidentally concerned the character for chastity or unchastity of those transported (*Pine* v. *United States*, 135 F. 2d 353, C. A. 5, cert. denied, 320 U. S. 740, 88 L. ed. 439; See *United States* v. *Mellor, supra*). Lack of consent is not an element. "Congress set out in the Mann Act to deal with cases which frequently, if not normally, involve consent and agreement on the part of the woman to the forbidden transportation" (*Gebardi* v. *United States*, 287 U. S. 112, 72 L. ed. 206; *Cleveland* v. *United States*, 329 U. S. 14, 91 L. ed. 12; *Miller* v. *United States*, 95 F. 2d 492, C. A. 9; *Morrow* v. *United States*, 201 F. 2d 363, C. A. 5; *United States* v. *Mellor, supra; United States* v. *Jamerson*, 60 F. Supp. 281, N. D., Iowa; *Burgess* v. *United States*, 291 Fed. 1002 (1924); *United States* v. *Williams*, 55 F. Supp. 375, D. Minn.). A consideration of all the cases makes it quite clear that the crime defined by the language with which we are concerned can be transportation with the intent to induce the commission of a simple act of fornication—an "isolated non-commercial venture based on impulse and reciprocating passion" (*United States* v. *Jamerson*,

supra, pp. 261, 264; *United States* v. *Fleenor*, *supra*, p. 484; *Elrod* v. *United States*, 266 Fed. 55, C. A. 6; *Johnson* v. *United States*, 215 Fed. 679, C. A. 7; *Sloan* v. *United States*, 287 Fed. 91, C. A. 8; *Qualls* v. *United States*, 149 F. 2d 891, C. A. 5; *Neff* v. *United States*, 105 F. 2d 688, C. A. 8; *Carey* v. *United States*, 265 Fed. 515, C. A. 8). The cases cited by the Service which would indicate that more than an act of fornication is required are not authoritative on the issue.

Not every violation of law involves moral turpitude. Moral turpitude is found in those acts or omissions which are so far "contrary to the moral law, as interpreted by the general moral sense of the community, that the offender is brought to public disgrace, is no longer generally respected, or is deprived of social recognition by good living persons" (*Matter of D*——, 1 I&N Dec. 190, 194). Ordinarily, moral turpitude is not found in conduct, which before it was made punishable as a crime, was not generally regarded as morally wrong, or as offensive to the moral sense of the community (*Coykendall* v. *Skrmetta*, 22 F. 2d 120, C. A. 5).

Does fornication involve moral turpitude? It is necessary to determine this because if fornication, a crime which may be punished under the language of the indictment with which we are concerned, does not involve moral turpitude, then it becomes our duty to rule that the conviction herein was not a crime inherently involving moral turpitude. Fornication is defined as illicit sexual intercourse (37 C. J. S. 117). Administratively, it had uniformly been held

that fornication does not involve moral turpitude. The Solicitor of Labor, in a memorandum dated April 29, 1926, stated "It can scarcely be maintained logically that simple fornication manifests on the part of its perpetrators such personal depravity or baseness as warrants the holding that it is a crime which involves moral turpitude." We have been unable to discover any departure from this view (*Matter of D——*, *supra; Matter of K——*, *supra;* see *Matter of O——*, 2 I&N Dec. 840).

Fornication—unlawful or illicit sexual intercourse—was not punishable at common law unless it was accompanied by public acts of indecency (37 C. J. S. 117; L. R. A., 1916, C. 653). Today, fornication is not a criminal offense in the absence of statutory change (37 C. J. S. 119). Some states have not made the statutory change and "occasional illicit intercourse" is not a crime in such state (*Warner* v. *State of Indiana*, 202 Ind. 479, 175 N. E. 661, 74 A. L. R. 1357; *United States ex rel Huber* v. *Sibray*, 178 Fed. 144, C. C., Pa.; reversed on other grounds 185 Fed. 401, C. A. 3; *Ex Parte Rocha*, 30 F. 2d 823, S. D. Tex.) In some states there have been enacted statutes which punish fornication only if it be committed by parties dwelling together in the same place in the manner of husband and wife for some period of time (37 C. J. S. 121; *Warner* v. *State, supra; Ex Parte Rocha, supra*). Elsewhere, it may be a crime only if committed between relatives so that it amounts to incest (*State* v. *Manley*, 74 A. 231, 82 Vt. 556).

The Service request that we find fornication is a crime involving moral turpitude, is based

upon the inability to find court cases holding that fornication does not involve moral turpitude.

No court in recent years had directly ruled upon whether fornication is a crime involving moral turpitude (the language in *Pollard* v. *Lyon*, 91 U. S. 225, 23 L. ed. 308 (1875) is dicta and as far as we know, has not been relied upon by any Federal court); however, the courts have, in many instances where fornication was involved, taken action which is consistent only with a finding that fornication did not involve moral turpitude.

This conclusion follows from the fact that one who has committed an act involving moral turpitude is ordinarily denied naturalization on the ground that good moral character has not been established (*In re Paoli*, 49 F. Supp. 128; *In re Nybo*, 34 F. 2d 151, affd. 42 F. 2d 727, C. A. 6; *In re Bookschnis*, 61 F. Supp. 751, D. Oregon; *Ralich* v. *United States*, 185 F. 2d 784, C. A. 8). Both in determining what constitutes good moral character and whether a crime involves moral turpitude, judgment is based upon the court's determination as to what is the generally accepted moral convention current at the time (*United States* v. *Francioso*, 164 F. 2d 163, C. A. 2; *In re Markiewicz*, 90 F. Supp. 191, W. D. Pa.; *Repouille* v. *United States*, 165 F. 2d 152, C. A. 2). Courts have found to be persons of good moral character, individuals who have committed illicit sexual acts despite the occurrence of these acts in the periods during which good moral character was required to be established. Thus, in *Schmidt* v. *United States*, 177 F. 2d 450, C. A. 2, the court

held that one who engaged in sexual intercourse with single and unmarried women on occasions—conduct that was "concupiscent and promiscuous, but not adulterous," did not engage in conduct that would cause the "common conscience" of man to hold the acts deprived him of good moral character (see also *Petition of R—*, 53 F. Supp. 969, D. Mass.; *United States* v. *Rubia*, 110 F. 2d 92, C. A. 5; *Application of Murra*, 178 F. 2d 670, C. A. 7; *United States* v. *Manfredi*, 168 F. 2d 752, C. A. 3; *United States* v. *Palombella*, 168 F. 2d 903 (C. A. 3)).[5] Furthermore, it is some importance to note that under the Immigration and Nationality Act Congress for the first time set up standards of good moral character. The commission of adultery was listed as requiring a finding that good moral character was lacking. No mention was made of fornication. As pointed out by counsel, it would be most incongruous for an act of illicit sexual intercourse on the part of an unmarried alien to be regarded as a crime involving moral turpitude and the basis for deportation when one who committed such an act could be granted the priceless gift of United States citizenship.

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[5] Respondent's petition for naturalization filed in 1944 was denied. While the reason for the denial could have been stated with greater clarity, it was not based on the ground that he had committed an immoral act or had been convicted under the Mann Act. It appears that the court, because the record reflected derogatory information concerning the respondent besides the conviction, gave to the fact that conviction existed, a weight, he would not otherwise have given it, and as a discretionary matter, denied the petition for naturalization (*Petition of Reginelli*, 86 F. Supp. 509, N. J.).

It thus appears that the mores of the community do not to this day require punishment of furtive illicit intercourse or private immoral indulgence of the individual. It would seem that moral turpitude should not be attached to the commission of an act which though immoral is not even regarded as a crime in some communities, and is one which the courts have held would not cause the "common conscience" to strip its perpetrator of good moral character.

We conclude therefore that under the language of the law which resulted in respondent's indictment and conviction, convictions for simple fornication are possible; that simple fornication does not involve moral turpitude; and that the language therefore does not inherently define a crime involving moral turpitude.

The Service argues that if it be concluded that fornication is a crime not involving moral turpitude, the instant conviction would still be one involving moral turpitude because respondent is charged with the *practice* of the illicit sexual act and the repetition of the act clothes it with the moral turpitude that a simple act of fornication does not have. No authority is cited for this view. The Service used the word "practice" interchangeably with "purpose" (*supra*). The courts have done likewise (*Carey* v. *United States*, 265 Fed. 515, 516, C. A. 8; *United States* v. *Lewis*, 110 F. 2d 460, C. A. 7, cert. denied 310 U. S. 634, 84 L. ed. 1404). No special significance need be given the word "practice." It requires no deeper meaning than that of "act" or "type of conduct." It does not necessarily imply a series of acts. To obtain conviction, proof that

transportation was with the intent to engage in one act of fornication would have been sufficient. Furthermore, the act specified herein is "the practice of *illicit sexual intercourse.*" If the act be one of simple fornication, repetition of the act with the same woman would not make the act more or less base. "One, two, or a half dozen acts of illicit intercourse would not of themselves constitute concubinage" (*United States* v. *Zee Lloya*, 35 Fed. 493, S. D. Ala. (1888)). The crime for which respondent was convicted does not involve moral turpitude. The Service has failed to establish that he has been convicted of two crimes involving moral turpitude. The charge must therefore fall.

The second charge is based on Sections 241 (a) (12) and 212 (a) (12) of the Immigration and Nationality Act (8 U. S. C. A. 1251 (a) (12) and 1182 (a) (12)). This matter is discussed by the special inquiry officer on pages 8 and 9 of his order. Briefly, the charge is that after his entry, the respondent behaved in such a manner as to make him a member of a class excluded from entering the United States. This excludable class is defined in Section 212 (a) (12). As attempt is made to apply the section to this case, it relates to a person who has "procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution or for any other immoral purpose." Is respondent one who attempted to procure a person for the purpose of prostitution or for any other immoral purpose? We find he is not such a person. To sustain the second charge, it is not necessary to establish that there has been a conviction for any violation of

law. Respondent's conviction under the Mann Act was therefore merely incidental. However, the incident which forms the basis for the conviction is relied upon as establishing that the respondent procured or attempted to procure or import a prostitute or person for purposes of prostitution or for other immoral purposes. Here it becomes necessary to examine the facts.

The facts will be taken from the summary by the United States Circuit Court of Appeals for the Third Circuit in the *United States.* v. *Reginelli,* 133 F. 2d 595, C. A. 3, cert. denied, 318 U. S. 783; which considered respondent's appeal from the Mann Act conviction. Respondent, a resident of New Jersey, left for a visit to Miami, Florida, having apprised the woman in the case, also a resident of New Jersey, of his contemplated trip. En route, he sent her a telegram in endearing terms and upon arriving in Miami, he again telegraphed her in the like vein and informed her of his arrival. The next day, he telegraphed her giving his hotel address, expressing his wish that she were there and stating that he would call her by telephone that evening, which he did. From then until February 2, 1942, he called her by telephone four additional times and talked with her on each occasion. One of the matters discussed was the prospect of her going to Miami while he was there. Acting in pursuance of an understanding arrived at with respondent by phone, the woman made the trip from New Jersey to Florida by plane upon a ticket which respondent himself had procured and paid for as he had told her he would do. Upon her arrival at the airport, in Miami, she was met by

respondent and with him rode in his automobile to his hotel in Miami Beach. She went to his room in the hotel and continued to live there during the whole of her ten-day sojourn in Miami. During that time she and respondent occupied the same bed in his room and had sexual relations.

These facts in the main were established by testimony of the woman. She also testified that the idea of her going to Florida to join the respondent originated with her and that respondent had frowned upon it and also he had objected to her going to his room when they arrived at the hotel in Miami. The jury "disbelieved or deemed inconsequential" this portion of the woman's testimony tending to exculpate respondent. The Circuit Court stated that in any event the portion of the woman's testimony freeing the defendant of an unlawful purpose was "at best but slight evidence of what was actually in the defendant's mind, so that even accepting the whole of her testimony at face, it was still for the jury to determine from all the proven facts what the defendant's purpose was in having the woman transported to Miami. This review of the facts clearly shows no more than that respondent engaged in extra marital relations with a willing woman over a ten-day period. Evidence adduced at the deportation hearing reveals no more. Does such conduct constitute an "immoral purpose" under Section 212 (a) (12)? We believe not.

The words "other immoral purpose" are, in the immigration law, words of art. (*Hansen* v. *Haff*, 291 U. S. 557 (1934).) It has been settled that the words "other immoral purpose" in the

phrase "for the purpose of prostitution or any other immoral purpose" mean an act of a like character with prostitution, and extra marital relations short of concubinage fall short of that description. In other words, the intent to have the illicit relations that were casual was not enough to bring a person into the category of those persons who were coming for an "immoral purpose". This was the meaning given the words "other immoral purpose" in the law prior to the Immigration and Nationality Act which is involved in the instant proceedings.

No change in this regard was made by the Immigration and Nationality Act. The Committee of the Judiciary whose investigation of the immigration system furnished the basis for the Immigration and Nationality Act of 1952, made the following recommendation concerning the excludability of immoral aliens:

> It is the recommendation of the subcommittee, however, that the excludable class of immoral aliens should be enlarged to include persons who have practiced prostitution or who have procured or attempted to procure or import prostitutes or other persons for immoral purposes, as well as those who are so engaged at the time of entry as provided in the law at present. This excludable class should include persons who seek to enter the United States to engage in *any illicit sexual act* or other immoral act, whether that purpose be the sole, principal or incidental purpose of their entry. This latter provision will overcome the decision of the Supreme Court in *Hansen* v. *Haff*. [Italics added.] (Report #1515, 81st Cong., 2d Sess., p. 358.)

We have previously decided that the change recommended by the Committee was not adopted by Congress when the Immigration and Nationality Act was passed (*Matter of B_____*, Int. Dec. 421). The words "other immoral purpose" in the immigration law remain words of art and specify acts of a like character with prostitution, a requirement not satisfied by extra marital relations short of concubinage. Concubinage has not been established. Can it be said that respondent was one who procured a person for the purpose of prostitution or acts of a like character with prostitution? Our answer is in the negative. Prostitution is the practice of a female offering her body to indiscriminate intercourse with men (73 C. J. S. 224). Unless otherwise defined by statute, it is distinguished from sexual intercourse confined to one man (*People ex rel Colletti* v. *Morehead*, 50 N. Y. S. 2d 78; *Commonwealth* v. *Kaniper*, 3 Pa. Co. 276; *Cleveland* v. *United States*, 329 U. S. 14, 17, 91 L. ed. 12; *United States* v. *Zee Lloya, supra*). We find no evidence in the record that the respondent procured the woman for the purpose of having her offer her body to indiscriminate intercourse with men. The second charge is clearly not sustained. Any other conclusion would rewrite the law to make deportable any alien who performed one act of fornication at any time after entry. No deportable ground is set forth in this record. The proceedings should be terminated.

Order: It is ordered that the decision of the special inquiry officer terminating proceedings be affirmed.

Case No. III

MATTER OF B--------, IMM. FILE NO. A-2544646

A. DECISION OF SPECIAL INQUIRY OFFICER

Discussion as to deportability: Hearing in this case was reopened in compliance with order of the Board of Immigration Appeals dated December 28, 1953, to afford the respondent an opportunity to apply for suspension of deportation.

The record shows that the respondent is a 57-year-old married male, a native of Italy and last a citizen of the United States, who was first admitted to the United States for permanent residence at New York, New York, on May 25, 1914. United States citizenship granted to the respondent in U. S. District Court, Cleveland, Ohio, on November 11, 1929, was cancelled by order of that Court on April 12, 1939, on the ground of fraud which erased the naturalization ab initio. His last entry into the United States occurred at New York, New York, on March 1, 1930, following a visit to Italy at which time he was admitted as a United States citizen (Exhibits 3, 4 and 5).

The record establishes that the respondent was arraigned in Common Pleas Court, Cuyahoga County, Cleveland, Ohio, charged with the crime of Perjury committed on or about April 7, 1932; was convicted, and on June 2, 1932, was sentenced to imprisonment in the Ohio State Penitentiary, Columbus, Ohio, for an indefinite period from which institution he was released on December 1, 1936, upon receiving a commutation of sentence from the Governor of Ohio (Exhibit 8).

The factors as to alienage and deportability have been adjudicated and a warrant directing deportation to Italy was issued on August 19, 1953. In view of the foregoing, the findings of fact and conclusions of law as to deportability contained in our order of March 20, 1953, will not be re-stated.

Discussion as to eligibility for suspension of deportation: The respondent has applied for suspension of deportation under the provisions of Section 244 (a) (5) of the Immigration and Nationality Act (Exhibit 10). The record establishes that he was legally married to a native-born citizen of the United States at Brooklyn, New York, on April 16, 1922 (Exhibits 11 and 18). Neither had been previously married. They have five children, the youngest being 23 years of age. Two of these children were born in Brooklyn, New York, and the other three in Cleveland, Ohio. They are all self-supporting. Respondent testified that his wife is totally dependent upon him for support and for the past eighteen or nineteen years has been a semi-invalid suffering from Sciatic Rheumatism, High Blood Pressure, and Diabetes; that she is confined to her bed two or three days a week; and that her condition is such that she requires partial care. A statement as to her physical condition from Dr. V. D. Ippolito, the family physician, was entered into evidence as Exhibit No. 16. He testified that for the past two years he has been employed as a tire salesman by the Cardinal Tire and Rubber Company, Cleveland, Ohio, and earns $65 a week (Exhibit 13), previous to which he had been employed for periods of about six months each as a Used Car

Salesman and as Partner in a Fish Market. He also testified that from about 1947 to 1950 he was a partner in the Lapuma-Spumoni Company, Cleveland, Ohio. In addition to his weekly wages he has a monthly income of $80 derived from rented property, and $15 a week paid by his son for board and lodging. His assets consist of an equity of about $15,000 in real property worth $22,000; household furniture worth, $2,000; and an equity of $2,900 in a Lincoln Automobile worth about $3,800. He also claims to owe about $4,000 in personal debt.

Exhibit 6 is report of Federal Bureau of Investigation, No. 137835, which respondent stated relates to him. This record indicates that his only conflict with the police authorities since his release from imprisonment in 1936 appears to have occurred on May 28, 1945, when he was held for investigation by the Pittsburgh Detective Bureau, and on August 25, 1950, when he was held for inquiry by the Cleveland Police Department. The report from the Cleveland Police Department, indicating that he has no criminal record, which was submitted, was entered into evidence as Exhibit 12. In view of the evidence of record, this report is, apparently, erroneous. There is no indication that the respondent has ever been a member of any subversive organizations.

The affidavits of ten persons have been submitted to establish respondent's good moral character for a period of over ten years (Exhibits 14, 15, 17, and 19). A report of a neighborhood Character Investigation conducted by this Service covering the last ten years is favorable to the respondent (Exhibit 20).

The file in respondent's case indicates that he has been at liberty under bonds in the sum of $5,000 and conditional parole executed on March 20, 1953, and on May 17, 1954 at Cleveland, Ohio. The bonds and conditional parole executed require in part:

> A. That subject alien shall conduct himself in a lawful and orderly manner; and shall not associate or consort with known criminals, or persons believed by him to be criminals, or persons engaged in criminal activities;
>
> B. That said alien shall not frequent places or establishments which he knows or has reason to believe criminals or persons with a criminal record congregate;
>
> C. * * *

Exhibit 9 consists of sworn statements taken from the respondent by an officer of this Service at Cleveland, Ohio, on January 20 and on April 19, 1954, in connection with his activities, associates, and compliance with the conditions of his bonds and conditional parole. The respondent testified that once or twice a week he visits one or two barber shops where he might meet persons whom he knows to have criminal records, which persons also have business in these shops and happen to be in or to come in same while he is present. He denied that he frequented these shops for the purpose of consorting or associating with such persons. He admitted that he frequented several bars and restaurants at nights for various reasons, among which is the place known as J. & J. Bar, 3849 Prospect Ave., Cleveland, Ohio, where at various hours he meets customers for the sale of tires and in which place

he gets most of his business from truck drivers who frequent the place. He denied that he frequented any of those places for the purpose of associating or consorting with persons who have criminal records or who are known criminals and that his meeting or passing the time of day with such persons, some of whom he has been acquainted with for years, is entirely incidental to his presence in these various places. There is no evidence of record other than as above indicated that the respondent has failed to comply with his conditional parole.

There is no evidence of record that the respondent has been other than a person of good moral character for the past ten years. The record shows that the respondent's deportation would, undoubtedly, result in exceptional and extreme hardship to his United States citizen spouse. He has been physically present in the United States for a period of over ten years. He registered under the Selective Service Act of 1940 and registered as an alien enemy in 1942 in compliance with law. He has submitted address report cards as required by aliens residing in the United States.

The respondent is a non-quota immigrant under the provisions of Section 101 (a) (27) (A) of the Immigration and Nationality Act. However, upon seeking to reenter the United States he would be inadmissible for reason of his conviction of the crime of Perjury in 1932.

It has been held that although a deportable alien may establish satisfactory eligibility for discretionary relief, he is not entitled thereto as a matter of right. *Sleddins* v. *Shaughnessy*, 177

F. (2d) 363 (C. C. A. 3, 1949); *U. S. ex rel. Bartach* v. *Watkins*, 175 F. (2d) 245 (C. C. A. 2, 1949). The grant or refusal of discretionary relief rests with the Attorney General. Exercise of that discretion requires consideration of all the facts and circumstances of a particular case.

Full consideration of all the evidence and attending facts and circumstances in this case leads to the conclusion that this is not the type of case contemplated to be the beneficiary of discretionary relief in the form of suspension of deportation under the provisions of Section 244 (a) (5) of the Immigration and Nationality Act. As a matter of administrative discretion the application will be denied.

Respondent has stated that if his deportation from the United States is directed by law, he desires to be sent to Italy.

Order: It is ordered that the application for suspension of deportation be denied.

It is further ordered that the order of March 20, 1953, directing that the alien be deported from the United States be re-instated in full force and effect.

The Board of Immigration Appeals has directed that this case be certified to that Board and final order will be entered in this case by the Board. You will be allowed 10 days in which to submit to this office any brief, memorandum, or request for oral argument which you desire to be transmitted with the record in this case for consideration by the Board.

B. DECISION OF BOARD GRANTING SUSPENSION

This case comes forward on appeal from an order entered by a special inquiry officer on November 15, 1954, denying the respondent's application requesting that his deportation be suspended under the provisions of Section 244 (a) (5) of the Immigration and Nationality Act of 1952 and directing that he be deported from the United States pursuant to law on the charge stated in the warrant of arrest. Counsel by brief and in oral argument on appeal urged that the respondent's deportation be suspended under the provisions of Section 244 (a) (5) of the Immigration and Nationality Act of 1952.

Discussion as to deportability: The respondent, a 58-year-old married male, native of Italy and last a citizen of the United States, first entered this country at New York, New York on May 25, 1914, at which time he was admitted for permanent residence (Ex. 5). The respondent was naturalized a citizen of the United States in the United States District Court, Cleveland, Ohio on March 18, 1929, at which time he was issued Certificate of Naturalization No. 3200557. United States Passport No. 142480 was issued to the respondent on November 19, 1929 (Ex. 4). The respondent departed from the United States during the latter part of the year 1929 and he last entered this country at New York, New York on March 1, 1930, at which time he was admitted as a citizen of this country (Ex. 4). The re-

spondent was convicted of the crime of perjury in the Common Pleas Court, Cuyahoga County, Cleveland, Ohio on June 2, 1932 (the offense being committed on or about April 7, 1932). He was sentenced to imprisonment in the Ohio State Penitentiary, Columbus, Ohio for an indeterminate period, being committed to the aforementioned institution on April [illegible], 1933. He remained an inmate of this institution until December 1, 1936, when his sentence was commuted by the Governor of Ohio. The record shows (Ex. 3) that it was decreed, ordered and adjudged by the United States District Court, Cleveland, Ohio on April 22, 1939 that the order of the United States District Court, Cuyahoga County, Ohio entered on November 15, 1928 admitting the respondent to citizenship, be vacated and annulled and certificate of naturalization number 3200557, issued by virtue of the latter order, be cancelled. In view of the foregoing, it is concluded that United States citizenship was erased ab initio. For the reasons stated, the respondent was an alien at the time he last entered the United States on March 1, 1930 and the crime of perjury for which he was convicted at Cleveland, Ohio on June 2, 1932 occurred within five years after his last entry. Accordingly, the respondent is subject to deportation on the charge stated in the warrant issued for his arrest on August 22, 1951.

Discussion as to eligibility for suspension of deportation: When this case was last before this Board on March 16, 1954, we denied the Assistant Commissioner's motion dated January 4, 1954 requesting that we reconsider our decision of December 28, 1953, wherein we entered an

order directing that the hearing be reopened for the purpose of affording the respondent an opportunity to apply for and prosecute an application for suspension of deportation as provided in section 244 (a) (5) of the Immigration and Nationality Act of 1952. The respondent's application requesting that his deportation be suspended under section 244 (a) (5) of the Immigration and Nationality Act was subscribed, sworn to and submitted for consideration on September 21, 1954, the date that the reopened hearing was conducted at Cleveland, Ohio (Ex. 10). The record reflects that the respondent was married to a native born citizen of the United States at Brooklyn, New York on April 16, 1922 (Ex. 11). Five citizen children were born of this union, two being born at Brooklyn, New York and the other three at Cleveland, Ohio (Ex. 10 & 18). All of these children are adults, the oldest being 31 and the youngest 23 (Ex. 10). The record shows that the respondent, except for three months' absence in Italy from November or December 1929 to March 1930, has resided continuously in the United States since his admission thereto for permanent residence on May 25, 1914. It is conceded that the respondent's citizen spouse is wholly dependent upon him for her support and maintenance. The record shows that the respondent's citizen spouse has been a semi-invalid for approximately 10 years, suffering with sciatic rheumatism, high blood pressure and diabetes. Within the past year and a half, she has been confined to the Mary Mount Hospital in Cleveland, Ohio on two occasions for hospitalization and treatment. Doctor V. D. Ippolito in

a letter dated September 16, 1954 advised that the respondent's citizen spouse cannot do any physical work because she is suffering from a complication of diseases (Ex. 16). The respondent has been employed as a tire salesman by the Cardinal Tire and Rubber Company, Cleveland, Ohio for the past two years, earning approximately $65 per week (Ex. 13).

The record shows that the respondent, over the years, has a record of gainful employment. He has accumulated an estate of approximately $20,000 from which he receives a monthly income of $80. There is nothing in the record to show that the respondent has been other than a person of good moral character since his release from imprisonment in 1936. The record reflects that he was arrested on May 28, 1945 and August 25, 1954 by the authorities at Pittsburgh, Pennsylvania and Cleveland, Ohio, respectively. He was charged with investigation and released shortly after each arrest (Exs. 6 and 12). There is nothing in the record to show that the respondent has ever been the recipient of public or private assistance. Likewise, the record is devoid of any evidence indicating that the respondent is now or has been a member of or affiliated with any proscribed or subversive organizations. Affidavits of numerous persons who have long known and are well acquainted with the respondent attest to the fact that he is a person of good moral character, friendly and loyal to the United States (Exs. 14, 15, 17 and 19). An independent character investigation conducted by the Service is entirely favorable to the respondent's application for the discretionary relief of suspension of de-

portation (Ex. 20). The record reveals that the respondent has been at liberty under bond in the sum of $5,000 and conditional parole executed on March 20, 1953 and on May 17, 1954, respectively, at Cleveland, Ohio. There is nothing in the record to indicate that the respondent has failed to comply with the terms of his conditional parole.

A brief résumé of the record shows that the respondent has resided continuously in the United States for a period of approximately 41 years. He is the husband/father of a citizen spouse and five citizen children. It is conceded that he has established good moral character for the ten year period required by statute and that he has been physically present in the United States for a continuous period of not less than ten years immediately preceding September 21, 1954, the date upon which he filed application for suspension of deportation. The respondent is eligible for a nonquota status. However, he is within one of the classes of persons enumerated in Section 212 (a) (9) of the Immigration and Nationality Act of 1952 ineligible to obtain immigration visas and he would therefore be inadmissible to the United States.

We have carefully considered all the evidence of record together with counsel's representations by brief and in oral argument on appeal and it is our considered opinion that the respondent's deportation would result in extreme and exceptionally unusual hardship to himself and his citizen family. For this reason and because he meets the other requirements of the statute, we have concluded to grant the respondent the discretionary

relief of suspension of deportation as provided in Section 244 (a) (5) of the Immigration and Nationality Act. Accordingly, the following order will be entered.

Order: It is ordered that the deportation of the alien be suspended under the provisions of Section 244 (a) (5) of the Immigration Act of 1952.

It is further ordered that the order entered by the special inquiry officer on November 15, 1954, be and the same is hereby withdrawn.

It is further ordered that if the Congress approves the suspension of the alien's deportation, the proceedings be cancelled and the alien, if a quota immigrant at the time of entry and not then charged to the appropriate quota, be so charged as provided by law.

It is further ordered that in the event Congress fails to take action approving suspension of the alien's deportation, the alien shall be granted the privilege of voluntary departure at his own expense in lieu of deportation and that if the alien, after notification, fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the alien shall be deported from the United States in the manner provided by law on the charge contained in the warrant of arrest.

C. DECISION OF BOARD WITHDRAWING GRANT OF SUSPENSION

This is a motion by the Service requesting that our order granting the alien suspension of deportation be withdrawn because information

possessed by the Service indicates that gambling activities in which the alien had engaged in the last ten years made him both statutorily ineligible for suspension of deportation and a person who was unsuitable for the grant of any administrative relief. The motion will be granted.

To be statutorily eligible for suspension of deportation, the alien is required, among other things, to establish that he has been a person of good moral character for a period of ten years prior to September 21, 1954 when he submitted his application for suspension of deportation (Section 244 (a) (5) Immigration and Nationality Act). An alien who during the ten year period in question derived his income "principally from illegal gambling activities" cannot as a matter of law establish that he has been a person of good moral character and is therefore ineligible for suspension of deportation (Section 101 (f) (4) Immigration and Nationality Act). The nature and source of the alien's income for the period in question is therefore a material matter. On the motion, the Service submitted information showing that in connection with naturalization proceedings, the respondent had shown his employment from 1943 to 1946 as being by an organization alleged by the Service to be a notorious gambling establishment in the State of Ohio. For the period 1943 to 1946, the information prepared by the alien concerning his employment for consideration by the Service and this Board *revealed that he was employed selling sweaters.*

As what is described to be a "link in a chain of evidence" which will show that the respondent

had engaged in gambling activities during the period in question, the Service pointed out in connection with this motion that when the respondent registered in 1940 as an alien, he listed himself as being employed in a gambling establishment. Clearly, a serious question by what appear to be admissions of the respondent himself is raised as to the manner in which the respondent earned his livelihood in the past ten years; whether this employment would preclude him from receiving suspension of deportation as a matter of law; and whether respondent made a full disclosure of his employment in connection with his application for suspension of deportation. These matters should be made a part of the record and the respondent be given an opportunity to explain the conflict.

The Service also desires to develop the fact that the respondent's conviction in 1932 for perjury arose out of an incident in which three individuals were killed in a shooting in Cleveland; and the fact that the respondent is a person whose credibility is suspect because of the manner in which he had concealed his arrest record on three occasions. We believe the Service should be given an opportunity to develop these and such other matters as they may deem material.

Counsel argues the motion should not be granted. He points out that there is nothing in the record from which it may be concluded that the respondent had failed to establish eligibility for suspension of deportation and that he knows of no evidence which should be considered by this Board. The fact is, that the Service desires to

reopen proceedings to enlarge this record and present matters material to the issue as to whether suspension of deportation should or should not be granted. The doctrine of res judicata does not apply to our decisions and we are not without power to reopen proceedings on motion of one other than the alien so that the record may contain all pertinent information.

Counsel states that no specific details of the derogatory information have been furnished so that he is unable therefore to dispute or refute the claim of the Service. He states also that it is his belief that the Service in making the motion has adopted as established certain newspaper comments which would not be admissible into evidence, one comment apparently being that a report concerning the alien was made by the Kefauver Committee. Counsel states his belief that no such report exists.

It appears that the Service will present information of a specific nature at the hearing which will enable counsel to be aware of the specific nature of its charges against the alien. He will then have adequate opportunity to present such evidence as he may deem material on the issue. The newspaper articles to which counsel refers and the Kefauver report have never been presented to this Board and are not mentioned by the Service. We have no knowledge of these matters. Our decision to reopen has been made solely on the matters presented to us by the Service and counsel (An envelope bearing respondent's name and marked confidential was submitted to us in the presence of counsel. The

contents of this envelope have not been referred to at this time and have formed no part in our conclusion to reopen).

Counsel argues that the Service has had ample opportunity for investigation and to present derogatory information at previous hearings. It is unnecessary to enter into a discussion of this issue. The principle of estoppel does not apply in these proceedings.

In a supplemental brief and on oral argument, counsel stated that there had been considerable newspaper publicity adverse to the alien and that this would have such a prejudicial effect against the alien in any future consideration of the case that he could not hope for a fair hearing. It is therefore requested that a postponement of the decision on this motion be made for a reasonable time to permit "a cooling off period" so that there would be a proper evaluation of any evidence that the Service desired to present. We do not believe decision should be delayed to a future date. Service officials and this Board are duty bound to make a fair and impartial decision. We believe that respondent will be given a fair and unprejudiced hearing and that counsel's objections on this score are premature. However, we believe that if counsel should desire that hearing be held at a city other than the one in which it was previously held, the Service should schedule the reopened hearing at a place mutually convenient to counsel and the Service.

Order: It is ordered that our order of March 8, 1955 granting the alien suspension of deportation be and the same is hereby withdrawn.

It is further ordered that the Service motion be and the same is hereby granted; that the proceedings be reopened to enable the introduction of such additional evidence as the Service and the alien may desire to present and for such other purposes as the special inquiry officer may deem appropriate.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 616

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK DISTRICT, DEPARTMENT OF JUSTICE,

Petitioner,

v.

UNITED STATES OF AMERICA, EX REL. JOSEPH ACCARDI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the Court of Appeals (Pet. App. 1a-21a) is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on January 7, 19[illegible]. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

Question Presented

In *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954) this Court held that under applicable regulations (8 C.F.R. 90.3, 90.12) prejudgment and interference with the discretion of the Board of Immigration Appeals by the Attorney General rendered a deportation order void, and a habeas corpus petition alleging such interference stated a cause of action. Thereafter the District Court found that the documentary and other proofs adduced herein did not sustain the allegations of prejudgment and dictation. The Circuit Court reversed upon the ground that the District Court's findings were clearly erroneous.

The question presented here is whether further review by this Court is appropriate to weigh the force and effect of the documentary and other proofs herein.

Statutes and Regulations Involved

Section 19(c) of the Immigration Act of 1917 [62 Stat. 1206; 8 U.S.C. 155 (c)], as amended provides in pertinent part as follows:

> "In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense in lieu of deportation, or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States

for seven years or more and is residing in the United States upon the effective date of this Act."

8 C.F.R. 90.3 (1949 Ed.) provides in part:

" . . . appeals shall lie to the Board of Immigration Appeals where orders, whatever their nature . . . arise in: . . . (2) Deportation proceedings . . . "

8 C.F.R. 90.12 (1949 Ed.) provides in part:

"The Board of Immigration Appeals shall refer to the Attorney General for review of the Board's decision all cases which:

(a) The Attorney General directs the Board to refer to him;

(b) The chairman or a majority of the Board believes should be referred to the Attorney General for review of its decision;

(c) The Commissioner requests be referred to the Attorney General by the Board and it agrees."

Statement

Respondent, Joseph Accardi, has been ordered deported on the ground that he entered the United States in 1932 without a visa (R. 2a, Par. 4). The Immigration file of respondent reveals that the only adverse factors in his record were two arrests in 1933 and 1934 which did not result in convictions and a 1940 suspended sentence for violation of 18 U.S.C. 88. The allegation of respondent's good moral character for the past ten years (R. 3a, Par. 7) is not only unopposed, but is corroborated by a favorable finding in the Decision of the Board of Immigration Appeals, dated April 3, 1953 (R. 183a, 184a). Notwithstanding his good moral character, his long residence here and his family ties, the Board without assigning reasons, refused to exercise dis-

cretion to permit respondent to remain in the United States as a permanent resident (R. 2a, Par. 4). The instant application for habeas corpus alleges:

(1) That the Attorney General maintains a confidential file relative to respondent, that the Government has included his name on a secret purge list, and that because of confidential information and other matters outside the record, including the proscribed listing of his name by the Attorney General on October 2, 1952, respondent was ordered deported in 1953 (R. 3a, 4a, Par. 11-16).

(2) That the Attorney General decided to deport respondent in October of 1952, and, accordingly, the case was prejudged in advance of the Board's decision of April 3, 1953 and that respondent was denied fair consideration of his case (R. 5a, Par. 19). This Court held that these allegations state a cause of action (347 U.S. 260).

The Government in its return to the writ herein admitted that Accardi was included within the special program of the Attorney General (R. 15a, Par. 12 and R. 45a).

It contended, however, in its return (R. 15a, 16a, Par. 12-14), in sworn oral testimony of the Chairman of the Board of Immigration Appeals (R. 105a), and in affidavits filed herein and responses to interrogatories (R. 24a, 46a) that the Attorney General's program was one to expedite cases rather than to deport. It was asserted that the program was one

> "intended to prevent unnecessary delays occasioned or tolerated through negligence or indifference of officials charged with the responsibility of carrying out enforcement measures provided for by statute," (R. 24a).

It was also claimed that the Board was not aware that Accardi was within the Attorney General's program at the

time of its decision (R. 55a), and accordingly that it could not have been influenced by it.

The matter came on for hearing upon the writ before Judge McGohey on June 23, 1954. Documentary evidence and depositions of six witnesses were received in evidence. Only one witness testified orally (R. 102a). Judge McGohey rejected the Government's contention that the Board was not aware that Accardi was within the program at the time of its decision (R. 189a, Finding 5). He did, however, rule that notification that Accardi was within the program was merely a request to expedite and, therefore, that Accardi had a fair hearing before the Board (R. 189a, Finding 3).

The Court of Appeals recognized that this Court had held in its previous decision that:

> " . . . public announcements clearly reveal that the Attorney General did not regard the listing as a mere preliminary to investigation and deportation; to the contrary, those listed were persons whom the Attorney General 'planned to deport.' "

It further observed that in addition to the public announcement, Attorney General McGranery's testimony (R. 136a *et seq.*) "amply supports the Supreme Court's interpretation" (Pet. App. 5a). Whether the program was one to expedite cases or to deport was the core of the dispute in the Courts below. The majority of the Court of Appeals held, upon the basis of the documentary evidence and the Attorney General's testimony that the District Court's ruling adverse to respondent was clearly erroneous (Pet. App. 13a). The dissenting opinion concluded that it was not (Pet. App. 21a).

Argument

The essence of the controversy herein is an issue of fact, i.e., whether the Attorney General's Program was one to

deport or merely to expedite cases as found by the District Court (R. 189a). If it was one to deport and the Board was aware of the program and that Accardi was included therein as found by the District Court (R. 189a, Finding 5), then prejudgment and interference with the Board's discretion were established. The Government's denial of prejudgment rested on three defenses: (1) That the program was one merely to expedite; (2) That the Board was not aware that Accardi was within the program; (This defense may not be raised here since the District Court ruled adversely to petitioner's contention and no cross-appeal was taken.) (3) That since the program was one merely to expedite, *ex parte* knowledge that Accardi was within the program—although admittedly an unfavorable factor—did not influence the Board's judgment.

The undisputed contemporaneous documentary evidence established a program of the Attorney General to deport rather than to expedite cases. The Board was aware of the contemporaneous expressions by the Attorney General of his program (R. 104a-106a) and was aware that Accardi was within the program. It was also established by documentary proof that Accardi was ordered deported pursuant to the program (R. 149a). This evidence, certainly created a prima facie case of prejudgment and bias, not overcome by self-serving statements that the Board's judgment was untrammeled because they interpreted the program, contrary to contemporaneous documentary proofs, Mr. McGranery's testimony, and this Court's prior decision herein, as one to expedite cases rather than to deport. Since there was a program to deport, and the Board was aware of Accardi's inclusion therein, a strong presumption existed that the Board followed the views of its superior, the Attorney General. This presumption was not overcome by any evidence in the record. This Court previously noted that a direct order from the Attorney

General to the Board was neither alleged nor to be proved for it "would be naive to expect such a heavy handed way of doing things." 347 U.S. at 267.

The decision below properly interpreted this Court's opinion. It finds adequate documentary and compelling support in the record and is the result of the application of proper standards of review.

(A) *The Attorney General's Program*

In its return (R. 15a, 16a, Par. 12, Par. 14) and in the affidavit of Mr. Friedman of May 10, 1954 (R. 22a), it was alleged that the Attorney General announced a program on October 2, 1952, designed to expedite cases because of the "accumulation of arrearages in much of the operation of the Service" (R. 21a). Response to interrogatory 13 asserts that the program of the "Attorney General is not a program to deport, but a program to expedite the consideration of deportability and that such cases were expedited in the same manner as other cases which merited priority" (R. 46a).

Exhibit 2 herein (R. 146a) contains contemporaneous press releases which were before the Supreme Court in its prior consideration of the case. The press release of Attorney General McGranery of October 2, 1952 (R. 148a), announced that "appropriate action will be taken against the unsavory characters who have continued to be aliens technically as well as in the broader sense," and that "the execution of this plan will do much to destroy the roots of organized crime in America." The press release of April 3, 1953 (R. 149a), announced, through Attorney General Brownell, that Joseph Accardi, known as a New Jersey racketeer, was ordered deported "*under the current denaturalization and deportation program of Attorney General Brownell against top racketeers and subversives.*"

On the basis of these documents, this Court observed:

> " . . . public announcements clearly reveal that the Attorney General did not regard the listing as a mere preliminary to investigation and deportation; to the contrary, those listed were persons whom the Attorney General planned to deport." 347 U.S. at 267.

This analysis of the press releases by this Court constitutes the law of the case. *White* v. *Higgins*, 116 F. 2d 312 (C.A. 1, 1940); 65 *Harvard Law Review* 822 (1952); 5 *Stanford Law Review* 751 (1953) and is *res judicata*. *United States* v. *Moser*, 266 U.S. 236, 242 (1924).

But, what is more important, the additional documentary proofs and testimony herein, doubly reinforce this Court's conclusion.

Mr. McGranery testified that his program was not as the Government contends born as a result of an accumulation of arrearages, but on the contrary that it was conceived because "political organizations, particularly in the large metropolitan areas, were in some cases dominated by racketeers" (R. 136a), and that it was as announced in a press release of December 8, 1952 (Exhibit 7, R. 166a), a program aimed at deporting and "ridding the nation of undesirable aliens engaged in racketeering and other criminal activities" (R. 136a). He further testified that while the Accardi case was on appeal before the Board of Immigration Appeals, he concluded that Accardi was a racketeer and he "*moved to deport him*" by placing him within the program (R. 141a). Mr. Horan, another witness, places this date at either November 19 or 20, 1952 (R. 79a).

William Sexton, who formerly represented the Government in this litigation admitted in open Court that Accardi was on the "Attorney General's proscribed list of alien deportees." Response to Interrogatory No. 9 (R. 45a, 347 U.S. 267).

Mr. McGranery identified the newspaper accounts (Exhibits 4, 5 and 6) as accurately reflecting his program (R. 135a). Mr. Finucane, Chairman of the Board of Immigration Appeals, testified (R. 104a) that he first learned of Mr. McGranery's program by reading the Washington Post and Evening Star (Exhibits 4 and 5). Exhibit 4 is headlined "U S. Plans to Deport 100 Alien Racketeers."

Exhibit 5 (R. 163a) reads:

> "The Justice Department's drive to rid the country of some 100 naturalized citizens and aliens with underworld and other unsavory reputations is no sudden face-saving device for the Democratic Administration according to Attorney General McGranery."

Exhibit 6 (R. 165a), the New York Times, likewise repeats that "McGranery starts a drive to deport Alien Racketeers * * * 100 gangsters involved." These exhibits name some six or seven specific individuals who were included within the program. Exhibits 7 and 7A (R. 166a, 167a) were press releases, issued in December 1952, before the Board's decision herein and received by the Board. They confirm that the program was a "deportation drive." Exhibits 7B and 7C (R. 168a, 169a), as well as Exhibit 2 (R. 150a), verify that Attorney General Brownell continued the program of his predecessor. The answer to Interrogatory 21 admits that the program was continued under Attorney General Brownell (R. 47a).

The Annual Report of the Commissioner of Immigration for the fiscal year ending June 30, 1953 (R. 171a), describes the program as

> "the Attorney General's special program for intensifying efforts looking toward the deportation and denaturalization of subversives, criminals, racketeers, narcotic law violators, and others who have demon-

strated that their presence is inimical to the United States."

No one who reads and analyzes the foregoing can find any language which justifies the belief that the Attorney General was concerned solely and merely with expedition or the removal of a back-log. As this Court declared, and as Mr. McGranery admitted with reference to Joseph Accardi, those within the program "were persons whom the Attorney General planned to deport," 347 U.S. at 267.

(B) *Petitioner's Case Was Not Unchallenged.*

Petitioner contends herein that its case in the Courts below presented unchallenged evidence that the Board of Immigration Appeals was not influenced by the Attorney General's program to "expedite cases" (Pet. 10). This is not true. The Government's case presented by interested witnesses, was not only challenged, but thoroughly discredited. Their interpretation as to the Attorney General's program, as we have shown above in paragraph A herein, was not only contradicted by Mr. McGranery but also by contemporaneous documentary evidence. In the instant case six witnesses testified through depositions. Only one witness testified orally. The balance of the case was documentary. Where documentary evidence, including depositions, is submitted, the Court of Appeals is "as well able as the trial judge to appraise credibility of the witnesses and draw inferences from their testimony" *Luckenbach* v. *United States*, 157 F. 2d 250, 251 (C.A. 2, 1946). See also: *Kind* v. *Clark*, 161 F. 2d 36, 46 (C.A. 2, 1947); *The Coastwise Transp. Corp.* v. *Charles Nelson Co.*, 68 F. 2d 720 (C.A. 2, 1934); *Norment et al.* v. *Stilwell*, 135 F. 2d 132 (C.A. 2, 1943); *Equitable Life Assurance Co.* v. *Irelan*, 123 F. 2d 462, 464 (C.A. 9, 1941); *Pfeifer Oil Transp. Co.* v. *The Ira S. Bushey*, 129 F. 2d 606 (C.A. 2, 1942); and

Bowles v. *Beatrice Creamery Co.*, 146 F. 2d 774 (C.A. 10, 1944).

In the instant case the only oral testimony presented was that of Mr. Finucane (R. 102a), an infinitesimal part of the case. The District Court found that the Board was aware that Accardi had been included within the Attorney General's program (R. 189a, Finding 5), contrary to the testimony of Mr. Finucane (R. 127a). This finding can not be challenged in this Court as petitioner seeks to do. Mr. Finucane twice asserted that he interrogated the Board Members and that no Board Member had any recollection that Accardi was within the program (R. 110a, 128a). Board Member Ludwig, however, distinctly remembered that he was aware of Accardi's inclusion within the Attorney General's program (R. 69a). And, Mr. Finucane testified that the Attorney General's program was not one to deport racketeers (R. 111a) contrary to the deposition of Mr. McGranery (R. 135a, 136a), press releases (R. 166a), and newspaper accounts identified by Mr. McGranery as accurate (R. 135a). Mr. Finucane admitted that these newspaper accounts and press releases were received and read by him (R. 104a), and that they were the sole source of knowledge of the program prior to April 3, 1953 (R. 106a). A man is presumed to know what a reasonable person ought to know from facts brought to his attention. *Avery* v *Commissioner of Internal Revenue*, 22 F. 2d 6, 7 (C.A. 7, 1927). Having read the press releases and newspaper accounts, Mr. Finucane "was under obligation to contradict the impression they must have created." *Kind* v. *Clark*, 161 F. 2d 36, 46 (C.A. 2, 1947). Nowhere did Mr. Finucane or any other government witness explain the basis for the impression that the program was one to expedite rather than deport—an impression which no one could gather from the contemporaneous announcements of Mr. McGranery. These announcements must be understood to convey the language

utilized in their ordinary and popular sense. The documentary proof herein of the program, if inconsistent—as it was—with the oral testimony of Mr. Finucane—must be given controlling weight. *Sachs* v. *Ohio Nat. Life Ins. Co.*, 148 F. 2d 128 (C.A. 7, 1945), cert. denied 326 U.S. 753; *Symington Co.* v. *National Malleable Casting Co.*, 250 U.S. 383 (1919). Where oral testimony "is in conflict with contemporaneous documents, we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 396 (1947).

It is clear, therefore, that the Attorney General did—just what the petition alleges and this Court denied him the right to do. He prejudged the case. Why? Mr. McGranery, notwithstanding the regulations, believed, of course in perfectly good faith—that he had the right to do it. For in his deposition he states (R. 142a):

> "Frankly, I can't get your point. I don't see what you are driving at. The Immigration Board of Appeals is the Attorney General."

When Mr. McGranery placed Accardi within his program, he did so to deport him as his testimony reveals (R. 141a). Notice of this fact was communicated to the Board while the case was spending before the Board (R. 189a, Finding 5). There was then, in 1952, no basis whatsoever for the Board to conclude that it was mere expedition that the Attorney General desired and, in fact, the Board did not expedite the case—on the contrary, decision in the case was delayed from November 1952 when Accardi was listed within the program until April 1953 when the case was decided.

Moreover, the Board was notified that an alien was within the program *ex parte* and without notice to the other side.

The notification was confidential. It did not request expedition but merely advised the Board that a person was within the Attorney General's program (R. 110a). The express language of the notification was, therefore, a communication that a person was included within the class of unsavory characters or racketeers whom the Attorney General desired deported. The Government admits, as it must, that no alien with a clear record, was the object of the program (R. 50a).

In the light of these considerations, both the majority and concurring opinions in the Court of Appeals properly found that the Board's self-serving denial that its judgment was influenced could not be accepted.

(C) *Relationship of instant case to Marcello and other cases*

We oppose the grant of certiorari in the instant case. We have, however, as reflected in the Government's petition consented to argue the instant case during this term if certiorari is granted and the Court's schedule permits such course.

It is not conceded by respondent, however, that the instant case will control the disposition of the *Marcello* case, (No. 145, O.T. 1954). The *Marcello* case involves undenied allegations of prejudgment. Here the allegations were disputed. Factual issues are determined by the proofs adduced in individual cases. In addition, the *Marcello* case involves the important issue of the application of the Administrative Procedure Act to deportation hearings. If the Marcello hearing be declared invalid on that ground, the issue here presented may not be reached. Finally, we do not believe that the instant case will affect a substantial number of cases: *First*, because each case must be decided on its facts; *Secondly*, as the Government is well aware

many persons within the program have already been deported (Michael Spinella, Vincenzo Carrollo, and Jaspare Matranga are three such individuals); *Thirdly*, several within the program have been declared nondeportable by the courts on other grounds, *Savoretti* v. *U.S. ex rel. Pincus*, 214 F. 2d 314 (C.A. 5, 1954); *Savoretti* v. *Voiler*, 214 F. 2d 425 (C.A. 5, 1954); *Fourthly*, the program as revealed by the instant record merely involved some one hundred persons including American citizens; and *finally*, the program has now been discontinued. It is therefore our considered judgment that not more than one or two dozen cases are outstanding which will be affected by the instant decision.

(D) *Basis for denying Supreme Court review herein.*

1. It is the practice of this Court by denying certiorari to leave undisturbed, decisions of Courts of Appeal involving solely a fair assessment of factual issues. The Supreme Court "is not the place to review a conflict of evidence" nor to reverse a Court of Appeals because the record is found "tilting one way rather than the other, though fair minded judges could find it tilting either way," *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498 at pp. 502-503 (1951). Review is denied in this Court where "conclusions of circuit courts of appeal depend on appreciation of circumstances which admit of different interpretations." *Federal Trade Commision* v. *American Tobacco Co.*, 274 U.S. 543, 544 (1927). The opinions below demonstrate that such is the case here. Review is here sought of factual issues which have been resolved in respondent's favor on issues as to whether the Attorney General's program was one to deport or expedite cases, whether the Board of Immigration Appeals was aware of such program and influenced by it. There is no occasion for this Court to further review these issues of fact.

2. The standard applied by the Court of Appeals in giving

controlling weight to contemporaneous documentary evidence submitted by respondent and in reversing clearly erroneous findings for petitioner in the District Court, conformed to the principles announced by this Court in *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 396 (1947). The dissenting opinion differed on the result herein, but acknowledged that this was the proper standard. Review is, therefore, not warranted to correct the application of standards of review by the Court of Appeals herein.

3. The majority opinion correctly interpreted this Court's previous ruling in the instant case. The Government had submitted the full text of press releases and public statements by various officials of the Department of Justice (R. 147a). This Court concluded that these "announcements clearly reveal that the Attorney General did not regard the listing as a mere preliminary to investigation and deportation; to the contrary, those listed were persons whom the Attorney General planned to deport," 347 U.S. at 267. Additional evidence and documentary proof were submitted below to reinforce this conclusion. The Court of Appeals properly relied upon the contemporaneous documentary evidence, *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 396 (1947), Mr. McGranery's testimony (R. 136a *et seq.*), and this Court's interpretation of the Attorney General's Program. The evidence warrants no other conclusion.

4. The factual basis alleged in defense herein was threefold. *First*, it was alleged that the program was in fact one merely to expedite cases. For the reasons noted above that theory may not be upheld. *Secondly*, it was asserted that the Board was not aware of the fact that Accardi had been included therein. The District Court rejected that contention and it may not be raised at this time since the petitioner did not cross-appeal to the Court of Appeals on this issue. Moreover, as noted by the Court of Appeals

(Pet. App. 7a), this rejection finds support in the record. *Thirdly*, it was contended that the Board was not influenced by the program because it believed the program to be one to expedite consideration of cases. We have shown in paragraph B, *supra*, that this contention flies in the face of the only rational interpretation reasonable individuals might have who read the contemporaneous documentary accounts of the program. The Board members acknowledged that their sole source of information at the time were these documentary accounts.

Rejection of these defenses leaves no alternative but to find that the program was one to deport and that the Board was aware of a direction to deport Accardi from the Attorney General. This is then rounded out by a Department of Justice announcement of April 3, 1953, that Accardi was actually ordered deported pursuant to the program (R. 149a). The evidence, therefore, clearly supports the charges in the habeas corpus application. Further review of these factual issues by this Court is not appropriate since the Court below properly evaluated the evidence herein.

Conclusion

The issues of fact presented herein do not merit the discretionary review accorded by a writ of certiorari. Moreover, in view of the fact that the result reached below is amply supported by documentary and other evidence, the petition herein should be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 616

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK DISTRICT, DEPARTMENT OF JUSTICE,

Petitioner,

v.

UNITED STATES OF AMERICA, EX REL. JOSEPH ACCARDI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 616

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service, New York District, Department of Justice,

Petitioner,

v.

UNITED STATES OF AMERICA, EX REL. JOSEPH ACCARDI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals (R. 197) is reported at 219 F. 2d 77 and the District Court's opinion (R. 188) is not reported.

Jurisdiction

The judgment of the Court of Appeals was entered on January 7, 1955, and a writ of certiorari was granted on

March 14, 1955. This Court's jurisdiction is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Did the Court of Appeals properly decide that respondent did not have a fair and open hearing in his deportation case before the Board of Immigration Appeals as is required by regulations and this Court's decision (347 U. S. 260) where documentary and undisputed evidence establish:

(a) That the Attorney General had a program to deport 100 alien racketeers which he announced in press releases and through the newspapers (R. 135, 148, 160).

(b) That the Attorney General decided in November 1952, *ex parte* and while the case was pending before the Board of Immigration Appeals that respondent was a racketeer (R. 137, 74) and thereafter included him within the program (R. 137, 141).

(c) That the Attorney General "moved to deport" Accardi while his case was pending upon appeal before the Board of Immigration Appeals (R. 141).

(d) That prior to April 3, 1953, the Board of Immigration Appeals was aware of the character of the Attorney General's program only through press releases and newspaper accounts (R. 104, 106).

(e) That prior to its decision herein the Board of Immigration Appeals was advised confidentially that the respondent was a racketeer or undesirable included within the Attorney General's program (R. 189, Finding 5; 109-110).

(f) That the Department of Justice announced on April 3, 1953, when releasing the opinion of the Board of Immigration Appeals, that the respondent was ordered deported under the Attorney General's current program against top racketeers (R. 149-150)?

2. Did the documentary evidence herein establish that the respondent had an unfair hearing before the Board of Immigration Appeals?

3. Did the Court of Appeals properly decide that the District Court's decision was in conflict with this Court's prior ruling herein and the documentary evidence that the Attorney General's program was one to deport?

4. Is further review appropriate by this Court to weigh the force and effect of the documentary and other proof herein?

Statutes and Regulations Involved

Section 19(c) of the Immigration Act of 1917 [62 Stat. 1206; 8 U. S. C. 155 (c)], as amended provides in pertinent part as follows:

> "In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense in lieu of deportation, or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act."

8 C. F. R. 90.3 (1949 Ed.) provides in part:

> ". . . appeals shall lie to the Board of Immigration Appeals where orders, whatever their nature . . . arise in: . . . (2) Deportation proceedings . . ."

8 C. F. R. 90.12 (1949 Ed.) provides in part:

"The Board of Immigration Appeals shall refer to the Attorney General for review of the Board's decision all cases which:

(a) The Attorney General directs the Board to refer to him;

(b) The chairman or a majority of the Board believes should be referred to the Attorney General for review of its decision;

(c) The Commissioner requests be referred to the Attorney General by the Board and it agrees."

8 C. F. R. 150.7 (b) (1949 Ed.) provides in part as follows:

"*Eligibility for departure in lieu of deportation or for suspension of deportation.* If the alien has applied for the privilege of departure in lieu of deportation or for suspension of deportation * * * the presiding inspector shall follow his conclusions of law as to the alien's deportability with a discussion of the *evidence* relating to the aliens eligibility for such relief and his reasons for his proposed order. * * *"

8 C. F. R. 151.2 (c); 1951 Supp. reads in part:

"*Hearing officer: specific duties.* * * * the hearing officer shall thereafter present all available evidence, including the interrogation of the alien and all witnesses presented concerning * * * (4) factors bearing upon statutory eligibility for discretionary relief, * * *"

8 C. F. R. 151.5 (1951 Supp.) provides in part as follows:

"*Decision—(a) Preparation of written decision.* * * * the hearing officer shall, as soon as practicable after the conclusion of the hearing, prepare in writing

a decision, signed by him, which shall set forth a summary of the evidence adduced and his findings of fact and conclusions of law as to deportability. If the alien has applied for relief from deportation, the decision shall also contain a separate determination as to whether or not the hearing officer is satisfied, on the basis of the evidence presented, as to the alien's statutory eligibility for the relief requested. * * * The hearing officer shall have no authority to exercise the Attorney General's powers under section 19 (c)(2) of the Immigration Act of 1917, as amended, or under the seventh proviso to section 3 of that act * * *".

Section 405(a) of Public Law 414 (66 Stat. 280), known as the Immigration and Nationality Act of 1952 provides:

"Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any * * * proceedings * * * done or existing at the time this Act shall take effect; but as to all such * * * proceedings * * * the statutes * * * repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * * An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, * * * which is pending on the date of the enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection."

Statement

Respondent, Joseph Accardi, has been ordered deported on the ground that he entered the United States in 1932 without a visa (R. 2, Par. 4). The Board of Immigration Appeals' opinion herein (R. 184) and the respondent's testimony (Immigration File, Minutes pp. 10, 25) reveal that the only adverse factors in respondent's record were

two arrests in 1933 and 1934 which did not result in convictions and a 1941 suspended sentence for violation of 18 U. S. C. 88 (R. 184). There is no record evidence indicating that he is a racketeer (R. 121). The allegation of respondent's good moral character for the past ten years (R. 3, Par. 7) is not only unopposed, but is corroborated by a favorable finding in the decision of the Board of Immigration Appeals, dated April 3, 1953 (R. 183, 184). Notwithstanding his good moral character, his long residence here and his family ties, the Board without assigning reasons, refused to exercise discretion to permit respondent to remain in the United States as a permanent resident (R. 2, Par. 4). The instant application for habeas corpus alleges:

> 1. That the Attorney General maintains a confidential file relative to respondent, that the Government has included his name on a secret purge list, and that because of confidential information and other matters outside the record, including the proscribed listing of his name by the Attorney General on October 2, 1952, respondent was ordered deported in 1953 (R. 3, 4, Par. 11-16).
>
> (2) That the Attorney General decided to deport respondent in October of 1952, and accordingly, the case was prejudged in advance of the Board's decision of April 3, 1953 and that respondent was denied fair consideration of his case (R. 5, Par. 19). This Court held that these allegations state a cause of action (347 U. S. 260).

The Government in its return to the writ herein admitted that Accardi was included within the special program of the Attorney General (R. 15, Par. 12 and R. 45).

After the Court's decision herein (347 U. S. 260) and a year after the filing of this action, the Attorney General's

office announced on April 23, 1954, that the deportation program was, contrary to this Court's views, one "publicly announced to proceed with vigor against aliens" in the undesirable class and that "effectuation of the program has been, and continues to be, the responsibility of those charged with prosecuting duties" (R. 17-18).

Thereafter, all Government witnesses except former Attorney General McGranery contended that the deportation program was solely one to expedite, and they embellished upon the fact that expedition alone was its origin and purpose.

It was contended in petitioner's return (R. 15, 16, Par. 12-14), in sworn oral testimony of the Chairman of the Board of Immigration Appeals (R. 105), and in affidavits filed herein and responses to interrogatories (R. 24, 46) that the Attorney General's program was solely one to expedite cases rather than to deport. It was asserted that the program was one

> "intended to prevent unnecessary delays occasioned or tolerated through negligence or indifference of officials charged with the responsibility of carrying out enforcement measures provided for by statute," (R. 24).

It was said that:

> "The Attorney General of the United States in the fall of 1952 commenced a program designed to give expeditious attention to the more serious cases on a priority basis" (R. 22).
>
> "The program of the Attorney General is not a program to deport, but a program to expedite the consideration of deportability" (R. 46).

It is now contended that statements in various press releases and public announcements relating to the Attorney

General's program "throughout refer to vigor in prosecution" of cases (Gov't Brief p. 30) rather than to a program to deport.

Former Attorney General McGranery, however, testified to the contrary. He stated that he became convinced that "undesirable persons engaged in racketeering were dominating, in some cases, political parties in metropolitan areas" and that the program was motivated by this thought (R. 136, 138). He further testified that his "deportation program" was aimed at "ridding the nation of undesirable aliens engaged in racketeering and other criminals activities" (R. 136-137).

Petitioner also claimed that the Board was not aware that Accardi was within the Attorney General's program at the time of its decision (R. 55), and accordingly, that it could not have been influenced by it.

The matter came on for hearing upon the writ before District Judge McGohey on June 23, 1954. Documentary evidence and depositions of six witnesses were received in evidence. Only one witness testified orally (R. 102). Judge McGohey rejected the Government's contention that the Board was not aware that Accardi was within the program at the time of its decision (R. 189, Finding 5). He did, however, rule that notification that Accardi was within the program was merely a request to expedite and, therefore, that Accardi had a fair hearing before the Board (R. 189, Finding 3).

The Court of Appeals recognized that this Court had held in its previous decision that:

> ". . . public announcements clearly reveal that the Attorney General did not regard the listing as a mere preliminary to investigation and deportation; to the contrary, those listed were persons whom the Attorney General 'planned to deport.' "

It further observed that in addition to the public announcement, Attorney General McGranery's testimony (R. 136 *et seq.*) "amply supports the Supreme Court's interpretation" (R. 199). Whether the program was one to expedite cases or to deport was the core of the dispute in the Courts below. The majority of the Court of Appeals held, upon the basis of the documentary evidence and the Attorney General's testimony that the District Court's ruling adverse to respondent was clearly erroneous (R. 204). The dissenting opinion concluded that it was not (R. 215).

A

This Court's Previous Decision

When the instant case was previously presented to the Supreme Court, the Acting Solicitor General submitted to the Court the documents which comprise Exhibit 2 herein (R. 147). These exhibits constituting official press releases of the Department of Justice may be summarized as follows:

> *October 2, 1952:* The Attorney General announces his special drive to deport alien racketeers.
>
> *April 3, 1953:* Announcement of Board of Immigration Appeals order of deportation against Joseph Accardi "known as a New Jersey racketeer". This action was taken "under the current denaturalization and deportation program of Attorney General Brownell against top racketeers and subversives."
>
> *April 30, 1953:* Announcement of apprehension of Joseph Accardi, "Newark, N. J. racketeer" for deportation on April 24, 1953.
>
> *May 11, 1953:* Announcement of denial by Board of Immigration Appeals of motion by Joseph Accardi, "Newark, New Jersey racketeer, for reopening of his deportation case."

May 20, 1953: Release of speech of May 19, 1953 by Attorney General Brownell before the Stark County Division, Ohio Republican Finance Committee Dinner at Canton, Ohio. At page 8 of speech, the Attorney General stated:

"But here are a few examples of the thousands of decisions and actions the Department of Justice may be called upon to make in a single day: * * * to initiate deportation proceedings against undesirables like Joseph Accardi * * *".

September 29, 1953: Deputy Attorney General Rogers announces at the Annual Conference of District Directors of the Immigration and Naturalization Service that the number of racketeers against whom deportation and denaturalization proceedings have been brought has increased from 96 to 131.

October 30, 1953: Address of Assistant Attorney General in charge of the Criminal Division before the Chicago Crime Commission (pp. 10-11):

"The second area is one in which the Department of Justice has not only primary but exclusive jurisdiction —the field of denaturalizing and deporting gangsters and racketeers, who are foreign born and who because of their criminal activities, can make no claim to remain in the United States while violating its laws. * * * To name but a few of the nationally known hoodlums who are the object of the program * * * Joe Accardi * * * and Joe Adonis of New York, have * * * been ordered deported."

Upon the basis of the foregoing this Court observed (347 U. S. at 267):

"Public announcements clearly reveal that the Attorney General did not regard the listing as a mere preliminary to investigation and deportation; to the

contrary, those listed were persons whom the Attorney General 'planned to deport' . . . In fact, the Assistant District Attorney characterized it as the 'Attorney General's proscribed list of alien deportees'. To be sure, the petition does not allege that the 'Attorney General ordered the Board to deny discretionary relief to the listed aliens'. It would be naive to expect such a heavy-handed way of doing things."

B

Summary of Pleadings

1. *The Petition* (R. 5), asserts that the respondent was not accorded a fair hearing before the Board of Immigration Appeals as noted above.

2. *The Return to the Writ* herein (R. 10), acknowledges that Accardi was within the Attorney General's program but contends that the program was merely intended "to prevent unnecesary delays". "No written instructions of any kind were issued at the inception of the program as to its scope or intent." (R. 17).

3. *Affidavit of Lester Friedman, May 10, 1954.* "The Attorney General of the United States in the fall of 1952 commenced a program designed to give expeditious attention to the more serious cases on a priority basis" . . . The program of the Attorney General "is a program intended to prevent unnecessary delay . . ." "Obviously all cases within the Attorney General's program have some unfavorable or unsavory factors in their background which make it more difficult for them to establish the type of merit which would warrant granting of discretionary relief." (R. 22, 26).

4. *Response to Interrogatories* (R. 43). The Attorney General's program was not one to deport but one to expedite cases (Response Nos. 2, 13). The Board of Immigration

Appeals received press releases of the Department of Justice (Response No. 42). It was rare to grant favorable relief in program cases (Response No. 38). Attorney General Brownell continued the program of Attorney General McGranery (Response No. 21). Assistant United States Attorney William Sexton acknowledged that Joseph Accardi was on the list of alien deportees (Response No. 9).

5. *Supplemental Response to Interrogatories* (R. 54). The Board of Immigration Appeals did not know that Accardi was added to the program at the time of its decision.

C

Summary of the Evidence

1. *Deposition of former Attorney General James P. McGranery.* (Exhibit 1, R. 134). Mr. McGranery testified that he became convinced that "undesirable persons engaged in racketeering were dominating, in some cases, the political parties in metropolitan areas" (R. 138) and accordingly on October 2, 1952, he announced a program, accurately reflected by Exhibits 2, 4, 5, 6, and 7 herein (R. 135, 136). Exhibit 2 (R. 148) is the official announcement of Mr. McGranery's program declaring that "appropriate action will be taken against unsavory characters who have continued to be aliens technically as well as in the broader sense . . . the execution of this plan will do much to destroy the roots of organized crime in America." Exhibits 4, 5 and 6 (R. 161-165), are newspaper items which Mr. McGranery asserted accurately reflected his program. They announce that "U. S. plans to deport 100 alien racketeers" (R. 161); "McGranery opens drive to deport 100 alien figures in underworld" (R. 165) and "McGranery disavows political motives in moves to deport 100 naturalized citizens, aliens" (R. 163).

Exhibit 7 (R. 166) is a December 8, 1952 press release announcing the arrest of Jack Dragna for deportation. It recites "The arrest, Mr. McGranery said, was another step in his denaturalization and deportation program aimed at ridding the Nation of undesirable aliens engaged in racketeering and other criminal activities." Mr. McGranery acknowledged that this press release accurately reflected his program (R. 136).

Mr. McGranery further acknowledged while the case of respondent was before the Board, he became satisfied that Accardi was a racketeer, and he thereupon placed him on his racketeer list (R. 137), that:

> "My investigation of Accardi indicated that he was a racketeer and that is the reason I moved to deport him." (R. 141).

2. *Deposition of Michael Horan* (R. 73). Mr. Horan testified that he is a Special Assistant to the Attorney General and that he was concerned with the program of Attorney General McGranery; that it was handled by a co-ordinating committee consisting of a Mr. Dunnigan, himself, and representatives of the Immigration Service, the Federal Bureau of Investigation and the Criminal Division. On November 19, 1952 (prior to oral argument of the case before the Board) Joseph Accardi's name was added to the program upon recommendation of the Immigration Service. Thereafter, from November 1952 through April 3, 1953, all these representatives received weekly progress reports on the case (R. 80). During this entire period of seventeen weeks or more the case was before the Board of Immigration Appeals.

3. *Depositions of Board Members Charles, Nettleton, Wilson and Ludwig* (R. 56). Miss Wilson and Mr. Ludwig testified that they became aware of the Attorney General's

program through the press (R. 59). Mr. Nettleton testified that he may have become aware of the program through the press and Mr. Charles at first testified that he could not answer the question (R. 58) but later acknowledged that he obtained knowledge of the program from newspapers (R. 68). Board Member Ludwig who heard oral argument on the Accardi case (R. 123) acknowledged that he saw Exhibit 7, (R. 61) which described the Attorney General's program as one "aimed at ridding the Nation of undesirable aliens engaged in racketeering" and admitted that he was aware that Accardi was within the Attorney General's program at the time of the Board's decision (R. 69). Board members Nettleton and Wilson did not recall whether they knew Accardi was within the program (R. 69). Mr. Charles and Mr. Nettleton had no recollection whether there was a Board conference on the case prior to the Board's decision on April 3, 1953, and Board Members Wilson and Ludwig stated they believed there was such a conference (R. 70).

4. *Oral testimony of Board Chairman Thomas G. Finucane.* Mr. Finucane testified that the Accardi case was certified to the Board in July, 1952, that he became aware of the Attorney General's program of October 2, 1952 through the Evening Star and Washington Post [Exhibits 4 and 5; R. 104] that the Board received the various press releases of the Department of Justice and that the normal practice was to circulate them among the Board Members (R. 104). He asserted that the Attorney General's program was not "a drive to expel racketeers and other undesirables" (R. 111) and that after interrogating the other Board Members he ascertained that no Board Member had any knowledge in April 1953 that Accardi was within the Attorney General's program (R. 128). [Compare contrary testimony of Board Member Ludwig—R. 69].

He acknowledged that the Accardi case was argued on No-

vember 26, 1952, that a request had been received from the Press Division in the Department of Justice for the Accardi decision prior to April 3, 1953, and that it was usual for such requests to be made in program cases (R. 114-117). He further admitted that prior to April 1953 a practice had grown up to notify the Board of program cases orally or in writing, that such notifications were *ex parte* and confidential and that they in form did not request expedition but merely stated that the case was within the Attorney General's program (R. 109, 111). It was admitted however, that when Accardi applied for reconsideration of his case, it was known that the Attorney General considered him a racketeer (R. 12).

5. *Exhibit 3* is the transcript of hearing herein before Judge Clancy wherein Assistant United States Attorney Sexton admits, as noted by the Supreme Court, that Accardi was on the list of alien deportees.

6. *Exhibits 7A to 7C* (R. 166-170) are press releases of the Department of Justice issued under Attorney Generals McGranery and Brownell on December 18, 1952, May 19, 1953 and May 8, 1953 and noting the "drive" or "program" of the Attorney General "against undesirable aliens engaged in racketeering and other criminal activities."

7. *Exhibits 8A* (R. 171) is an excerpt from the 1952-1953 Annual Report of the Immigration Service referring to the "Attorney General's special program for intensifying efforts looking toward the deportation and denaturalization of subversives, criminals, racketeers, narcotic law violators, and others who have demonstrated that their presence is inimical to the United States."

8. *Exhibit 2*, consisting of the various press releases and speeches of the Department of Justice and summarized in Point A supra.

Summary of Argument

I

In the secrecy of his chambers and while the respondent's case was pending on appeal before the Board of Immigration Appeals, the Attorney General made an *ex parte* determination that Accardi was a racketeer (R. 137) and "moved to deport" him (R. 141)—contrary to the law as set forth by this Court in its prior consideration herein. The views of the Attorney General were made known to the Board by press releases and newspaper accounts—all of which leave no doubt that his program was one to deport designated aliens and not merely to expedite the consideration of their cases. (R. 36, 148, 160-167). No other source of knowledge as to the program was available to the Board prior to April 3, 1953, the date it decided this case. (R. 104). That Accardi was within the program and thus marked for deportation was made known to the Board by a confidential communication which interfered with its impartial consideration of the case. (R. 109-110, 189; Finding 5). To be sure—the Attorney General did not order to Board to deport Accardi by a direct communication but his views were made known through official press releases which the Board received (R. 104) and by a confidential message that Accardi was within the program. It would be naive as noted by this Court (347 U. S. at 267) to expect the Attorney General to issue a direct order.

II

The documentary proofs establish that Accardi was denied the fair hearing to which this Court declared he was entitled. The Court of Appeals properly evaluated the case below since the issue is not one of credibility but of the controlling weight to be given to deposition testimony and contemporaneous documentary evidence. *United States* v.

United States Gypsum Co., 333 U. S. 364 (1947); *Orvis* v. *Higgins*, 180 F. 2d 537 (C. A. 2, 1950). An appellee court may evaluate the force and effect of such testimony as well as a district judge. *Luckenbach* v. *United States*, 157 F. 2d 250 (C. A. 2, 1946).

There is no dispute that Accardi was within the Attorney General's program and that the Board was aware of this fact. (Govt. Brief p. 25, R. 189, Finding 5). The petitioner however, insists that statements in various press releases and public announcements relating to the Attorney General's program "throughout" refer to "vigor in prosecution" of cases rather than a program to deport. (Gov't Brief p. 30). It was upon this conception of the press releases and public announcements—the sole source of the Board's knowledge prior to April 3, 1953—and the claim that the Board members were unaware of the Accardi listing (R. 55, 110) that the Board asserted the independence of its decision.

The supporting props for this claim of independence were not only challenged but were completely demolished. The District Court found that the Board was in fact aware of the Accardi listing. (R. 189, Finding 5). The assertion that the program was conceived and carried out solely in the interest of fair-minded expedition of cases was likewise discredited. Not a single press release or announcement prior to the Board's decision of April 3, 1953 speaks of vigor in the prosecution or expedition of cases. The claim that the program was originated because of a backlog of cases (R. 24) was refuted by former Attorney General McGranery. This Court in its decision herein noted that the program listed aliens who were marked for deportation. (347 U.S. at 267). Moreover, Mr. McGranery freely acknowledged that while this case was pending before the Board, he moved to deport Accardi after first deciding *ex parte* that he was a racketeer. The Board thereafter received a confidential communication

which did not request expedition but advised that Accardi was within the program (R. 109-110; 189)—a communication which marked Accardi an undesirable alien. Finally, the Department of Justice acknowledged that Accardi was ordered *deported* by the Board pursuant to the program. (R. 149-150). The Board read the press releases and the public announcements relative to the Attorney General's program. It should therefore be charged with the understanding that reasonable men would draw from such documents issued prior to April 3, 1953. *Avery* v. *Commissioner of Internal Revenue*, 22 F. 2d 6, 7. (C.A. 7, 1927). The Board members are accordingly charged with knowledge that the Attorney General desired to deport 100 alien racketeers (R. 160-167), that he considered Accardi a racketeer (R. 189, Finding 5) and desired to deport him. Prejudgment is clearly established on this record.

III

Immigration regulations applicable to this case require that an application for suspension of deportation be decided on the record evidence. *Alexiou* v. *McGrath*, 101 F. Supp. 421 (Dist. of Col., 1951). The confidential advice given to the Board that Accardi was within the program—admittedly an adverse factor, tainted the case with unfairness and rendered the Board's decision void. *Alexiou* v. *McGrath, supra.*

IV

The Attorney General's conduct herein was that of a conscious militant participant in the creation of adverse publicity against program cases. Each case was customarily the subject of a press release (R. 74). As in *Delaney* v. *United States*, 199 F. 2d 107 (C.A. 1, 1952) an atmosphere was created (here by the Department of Justice itself) which prevented fair, open, and impartial consideration of Accardi's case which the regulations and due process guaranteed to

respondent. The tampering with the Board—by confidential communications of an adverse nature should presumptively be deemed as prejudicial—if not more so, than the situation presented in jury cases where the nature of the communication might be unknown. See *Remmer* v. *United States*, 347 U.S. 227 (1954).

Fairness accordingly was denied to respondent by prejudgment, by improper adverse publicity and by an improper confidential communication to the Board.

I

The Court of Appeals Was Authorized to Evaluate the Evidence and Reverse the District Court Insofar as the Latter's Findings Were Either (1) Clearly Erroneous or (2) In Conflict With Contemporaneous Documentary Proofs

It is clear that under Rule 52(a) of the Rules of Civil Procedure, findings of fact which are clearly erroneous may be reversed by the Court of Appeals. *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 356 (1947).

Where as, here, the Government's contentions and the District Court's findings are challenged by contemporaneous documentary evidence, appellate courts are as free to decide the case as the District Court.

Unlike *United States* v. *Oregon Med. Soc.*, 343 U.S. 326 (1952) this is not an appeal from an issue of fact where appellate courts rely exclusively upon determinations of district judges upon issues of credibility. Where documentary proofs or depositions are the primary source of evidence, the appellate court may substitute its judgment for that of the District Court. In the instant case six witnesses testified through deposition. Only one witness testified orally. The balance of the case was documentary. The applicable

rule is set forth by Judge Frank in *Orvis* v. *Higgins*, 180 F. 2d 537 (C.A. 2, 1950) where it was said at page 539:

> (a) "If he (The District Judge) decides a fact issue on written evidence alone, we are as able as he to determine credibility, and so we may disregard his finding.
>
> (b) Where the evidence is partly oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge's finding and substitute our own, (1) if the written evidence or some undisputed fact renders credibility of the oral testimony extremely doubtful, or (2) if the trial judge's finding must rest exclusively on the written evidence or the undisputed facts, so that his evaluation has no significance. . . ."

See Also: *Fritz* v. *Jarecki*, 189 F. 2d 445 (C.A. 7, 1951)

Where evidence is taken by deposition the same rule is applicable and the Court of Appeals is "as well able as the trial judge to appraise credibility of the witnesses and draw inferences from their testimony." *Luckenbach* v. *United States*, 157 F. 2d 250, 251 (C.A. 2, 1946). See also: *Kind* v. *Clark*, 161 F. 2d 36, 46 (C.A. 2, 1947); *The Coastwise Transp. Corp.* v. *Charles Nelson Co.*, 68 F. 2d 720 (C.A. 2, 1934); *Norment et al* v. *Stilwell*, 135 F. 2d 132 (C.A. 2, 1943); *Equitable Life Assurance Co.* v. *Irelan*, 123 F. 2d 462, 464 (C.A. 9, 1941); *Pfeifer Oil Transp. Co.* v. *The Ira S. Bushey*, 129 F. 2d 606 (C.A. 2, 1942) and *Bowles* v. *Beatrice Creamery Co.*, 146 F. 2d 774 (C.A. 10, 1944).

In the instant case, the only oral testimony presented was that of Mr. Finucane (R. 102) an infinitesimal part of the case.

Obviously, the testimony of Mr. Finucane, the Board Chairman, was not controlling. Whether the Board was influenced by the Attorney General could only be determined

by evaluating the attitude of a majority of the Board who passed upon Accardi's case. As a majority of the Board testified through depositions, the Court of Appeals could determine credibility herein as well as the District Court.

II

The Government's Contention That the Attorney General's Program Was One to Expedite Cases Was Clearly Discredited

After this Court's decision herein, and more than one year after the institution of this litigation, notice was given on April 23, 1954, to all divisions in the Department of Justice, that the Attorney General's program "has been and continues to be, the responsibility of those charged with prosecuting duties." It was said, contrary to this Court's decision, that the program was one "publicly announced to proceed with vigor against aliens" in the undesirable class (R. 18). Thereafter, all Government witnesses contended that the program was one solely to expedite cases.

In its return (R. 15), Par. 12, Par. 14, and in the affidavit of Mr. Friedman of May 10, 1954 (R. 22) it is alleged that the Attorney General announced a program on October 2, 1952, designed to expedite cases because of the "accumulation of arrearages in much of the operation of the Service" (R. 21). Response to interrogatory 13 asserts that the program of the Attorney General is not a program to deport but a program to expedite the consideration of deportability and that such cases were expedited in the same manner as other cases which merited priority" (R. 46).

In its brief here (p. 30) the Government asserts that all public statements of the Attorney General with reference to his deportation program displayed "throughout" a concern solely for "vigor in the prosecution" of cases. Not a single press release or public statement prior to the Board's deci-

sion herein on April 3, 1953 reflect concern for the expedition of cases. (See Exhibits 2, 4-7A; R. 148, 160-167). They all speak of "deporting and ridding the nation of undesirable aliens engaged in racketeering" (R. 166) and it was this expression that former Attorney McGranery identified as accurately describing his program (R. 136). True, after this litigation was instituted on May 15, 1953 (R. 6) and after this Court's decision on March 15, 1954, an April 1954 Department of Justice memorandum was circulated contradicting this Court's views and describing the program as one solely concerned with vigorous prosecution. (R. 18). As Judge Clark observed, such instructions hardly constituted a timely withdrawal of the list. (R. 214).

The contention that the program was one to expedite cases rather than to deport is fantastic in the light of the record herein. Attorney General McGranery established a coordinating committee consisting of several representatives from the F.B.I., the Criminal Division, the Immigration Service, and the Deputy Attorney General's Office to administer the Attorney General's deportation program (R. 74 et seq., 138) and notification that a case was within the program was always secretly communicated to the Board of Immigration Appeals (R. 109-110). If expedition was the sole objective, why was secrecy required? Weekly reports were issued on each case to the Attorney General, the Deputy Attorney General, the F.B.I., the Criminal Division, and others (R. 80). If expedition were the sole aim of the program, it seems incredible that such elaborate secret machinery would be necessary. Was the Department of Justice and the Board of Immigration Appeals really concerned with expediting favorable as well as unfavorable consideration of cases whom the Attorney General had marked for deportation? The assertion that there were many aliens within the program who "have been the beneficiaries of favorable administrative action" (R. 51),

an assertion repeated in the petitioner's brief (p. 34), is completely refuted by the Chairman of the Board who stated that in all program cases the aliens had been directed to leave the country. (R. 119-120). To this may be added the admission that all program cases necessarily "have some unfavorable or unsavory background" rendering favorable action difficult. (R. 50) and the fact that every pertinent press release without exception announced the deportation of an alleged racketeer under the Attorney General's current program (R. 74, 149-150, 166, 167). Not a single press release spoke of expedition or favorable action in a program case.

We believe that the record evidence clearly refutes and discredits the contention that the program was one solely to expedite the consideration of cases.

Exhibit 2 herein (R. 146) contains press releases which were previously filed with this Court. The press release of Attorney General McGranery of October 2, 1952 (R. 148), announces that "appropriate action will be taken against the unsavory characters who have continued to be aliens technically as well as in the broader sense" and that "the execution of this plan will do much to destroy the roots of organized crime in America." The press release of April 3, 1953, (R. 149) announces, through Attorney General Brownell, that Joseph Accardi, known as a New Jersey racketeer, was ordered deported "under the current denaturalization and deportation program of Attorney General Brownell against top racketeers and subversives."

On the basis of these documents this Court observed:

> ". . . public announcements clearly reveal that the Attorney General did not regard the listing as a mere preliminary to investigation and deportation; to the contrary, those listed were persons whom the Attorney General planned to deport." 347 U. S. at 267.

This analysis of the press releases by the Court constitute the law of the case. *White* v. *Higgins*, 116 F. 2d 312 (C. A. 1, 1940); 65 *Harvard Law Review* 822 (1952); 5 *Stanford Law Review* 751 (1953) and is *res judicata*. *United States* v. *Moser*, 266 U. S. 236, 242 (1924).

But, what is more important, the additional documentary proofs and testimony herein, doubly reinforce this Court's conclusion.

Mr. McGranery testified that his program was not as the Government contends born as a result of an accumulation of arrearages, but on the contrary that it was conceived because "political organizations, particularly in the large metropolitan areas, were in some cases dominated by racketeers" (R. 136), and that it was as announced in the Jack Dragna press release of December 8, 1952 (Exhibit 7, R. 166) a program aimed at "deporting and ridding the nation of undesirable aliens engaged in racketeering and other criminal activities." (R. 136.) He further testified that while the Accardi case was on appeal to the Board of Immigration Appeals, he concluded that Accardi was a racketeer and he "moved to deport him" by placing him within the program (R. 141). Mr. Horan places this date at either November 19 or 20, 1952 (R. 79).

The statement by Mr. McGranery that he moved to deport Accardi during the time that the Board was deciding the case—an admission which cannot be distorted into a request for expedition—clearly made it unnecessary to prove the so called dramatic statement by the Commissioner that Accardi's case was hopeless because he was on the list of 100 (See: Gov't Brief pp. 10, 24, 31). The Attorney General's admission cannot be construed to mean that a decision was made to institute deportation proceeding against Accardi because that had already been done, and the case was in the final appellate stage administratively. It

could only mean, exactly what the words imply, that the Attorney General listed Accardi for deportation.

William Sexton, who formerly represented the Government in this litigation admitted in open Court that Accardi was on the "Attorney General's proscribed list of alien deportees." Response to Interrogatory No 9 (R. 45, 347 U. S. 267).

Mr. McGranery identified the newspaper accounts (Exhibits 4, 5 and 6) as accurately reflecting his program (R. 135). Mr. Finucane testified (R. 104) that he learned of Mr. McGranery's program by reading the Washington Post and Evening Star (Exhibits 4 and 5). Exhibit 4 is headlined "U. S. Plans to Deport 100 Alien Racketeers."

Exhibit 5 reads:

> "The Justice Department's drive to rid the country of some 100 naturalized citizens and aliens with underworld and other unsavory reputations is no sudden face-saving device for the Democratic Administration according to Attorney General McGranery."

Exhibit 6, the New York Times, likewise repeats that "McGranery starts a drive to deport Alien Racketeers * * * 100 gangsters involved." These exhibits name some six or seven specific individuals who were included within the Program. Exhibit 7 and 7A (R. 166, 167) were press releases, issued in December 1952, before the Board's decision herein and received by the Board. They confirm that the program was a "deportation drive." Exhibits 7B and 7C (R. 168, 169) as well as Exhibit 2 (R. 150) verify that Attorney General Brownell continued the program of his predecessor. The answer to Interrogatory 21 admits that the program was continued under Attorney General Brownell (R. 47).

The Annual Report of the Commissioner of Immigration

for the fiscal year ending June 30, 1953 (R. 171) describes the program as

> "the Attorney General's special program for intensifying efforts looking toward the deportation and denaturalization of subversives, criminals, racketeers, narcotic law violators, and others who have demonstrated that their presence is inimical to the United States."

No one who reads and analyzes the foregoing can find any language which justifies the belief that the Attorney General was concerned solely and merely with expedition or the removal of a back-log. As this Court declared and as Mr. McGranery admitted with reference to Joseph Accardi, those within the program "were persons whom the Attorney General planned to deport." 347 U.S. at 267.

III

The Finding that the Board Was Notified that Accardi Was Within the Attorney General's Program Solely to Expedite the Case Was, Clearly Erroneous

The District Court found that the purpose of notifying the Board that a case was within the Attorney General's program "was merely to indicate that the Attorney General desired expeditious consideration of the Appeal" and that the Board so understood it (R. 189, Finding 3).

This conclusion stems initially from the theory that the program was one to expedite cases—a contention refuted by the Supreme Court in the instant case and the documentary evidence herein (Point II, *supra*). It is likewise contrary to the deposition of Mr. McGranery (R. 136) and contrary to the Department of Justice press release of April 9, 1953 (R. 150) announcing that Accardi was being *deported* pursuant to the Attorney General's program.

Petitioner contends herein that its case in the Courts below presented unchallenged evidence that the Board of Immigration Appeals was not influenced by the Attorney General's program to "expedite cases" (Pet. 10). This is not true. The Government's case presented by interested witnesses, was not only challenged, but thoroughly discredited. Their interpretation as to the Attorney General's program, was not only contradicted by Mr. McGranery but also by contemporaneous documentary evidence.

The District Court commented that it accepted completely the testimony of Mr. Finucane, the Board's Chairman, which was neither shaken nor controverted. Yet, the District Court below found that the Board was aware that Accardi had been included within the Attorney General's program, (R. 189. Finding 5) contrary to the testimony of Mr. Finucane (R. 127). Mr. Finucane twice asserted that he interrogated the Board Members and that no Board Member had any recollection that Accardi was within the program (R. 110, 128). Board Member Ludwig, however, distinctly remembered that he was aware of Accardi's inclusion within the Attorney General's program (R. 69). And, Mr. Finucane testified that the Attorney General's program was not one to deport racketeers (R. 111) contrary to the deposition of Mr. McGranery (R. 135, 136), press releases (R. 166), and newspaper accounts identified by Mr. McGranery as accurate (R. 135). Mr. Finucane admitted that these newspaper accounts and press releases were received and read by him (R. 104), and that they were the sole source of knowledge of the program prior to April 3, 1953 (R. 106). A man is presumed to know what a reasonable person ought to know from facts brought to his attention. *Avery* v. *Commissioner of Internal Revenue*, 22 F. 2d 6, 7 (C.A. 7, 1927). Having read the press releases and newspaper accounts, Mr. Finucane "was under obligation to contradict the impression they must have cre-

ated." *Kind* v. *Clark*, 161 F. 2d 36, 46 (C.A. 2, 1947). Nowhere did Mr. Finucane or any other government witness explain the basis for the impression that the program was one to expedite rather than deport—an impression which no one could gather from the contemporaneous announcements of Mr. McGranery. These announcements must be understood to convey the language utilized in their ordinary and popular sense. The documentary proof herein of the program, if inconsistent—as it was—with the oral testimony of Mr. Finucane—must be given controlling weight. *Sachs* v. *Ohio Nat. Life Ins. Co.*, 148 F. 2d 128 (C.A. 7, 1945) cert. denied 326 U.S. 753; *Symington Co.* v. *National Malleable Casting Co.*, 250 U.S. 383 (1919). Where oral testimony "is in conflict with contemporaneous documents, we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 396 (1947).

The basis for concluding that the Board was not influenced by the Attorney General's program was *first* the claim, that the program was considered merely one to expedite. Rejection of this contention requires rejection of the Board's claim that it was not influenced by notification that Accardi was within the program. *Secondly*, it was asserted that the Board was not influenced because it did not know that Accardi was within the program (R. 55). This claim was rejected by the District Court (R. 189, Finding 5). With these two contentions discredited, the factual basis for the Board's testimony that they were not influenced by the program is removed. This is supplemented by the testimony of Mr. McGranery.

Mr. McGranery frankly states that while the case was pending before the Board, he made up his mind that Accardi was a racketeer and he "moved to deport him" (R. 141).

It is undisputed that Accardi was placed within the program on November 19, 1952, while the case was pending before the Board and before it was argued orally on November 26, 1952 (App. 79, 181). It is undisputed that Mr. Sexton admitted that Accardi was on the list of alien deportees (R. 45), and that the Department of Justice announced on April 3, 1953, *that Accardi was ordered deported pursuant to the Attorney General's program* (R. 150).

It is clear therefore that the Attorney General did—just what the petition alleges and the Supreme Court denied him the right to do. He prejudged the case. Why? Mr. McGranery, notwithstanding the regulations, believed, of course in perfectly good faith—that he had the right to do it. For in his deposition he stated: (R. 142).

> "Frankly, I can't get your point. I don't see what you are driving at. The Immigration Board of Appeals is the Attorney General."

When Mr. McGranery placed Accardi within his program, he did so to deport him as his testimony reveals (R. 141). Notice of this fact was communicated to the Board while the case was still pending. (R. 189, Finding 5). There was then, in 1952, no basis whatsoever for the Board to conclude that it was mere expedition that the Attorney General desired and in fact, the Board did not expedite the case—on the contrary decision in the case was delayed from November 1952 when Accardi was listed within the program until April 1953 when the case was decided.

Moreover, the findings of the District Court completely ignore the manner of notification. The Board was notified that an alien was within the program *ex parte* and without notice to the other side. The notification was confidential. It did not request expedition but merely advised the Board that

a person was within the Attorney General's program (R. 110). The typical notification was as follows (R. 109-110):

Memorandum

From: Mr. Rawitz.
To: Thomas G. Finucane. Re: (alien's name).

Confidential

I have just been informed that the above named alien has been placed on the Attorney General's list.

Confidential

The express language of the notification was therefore a communication that a person was included within the class of unsavory characters or racketeers whom the Attorney General desired deported. The Government admits, as it must, that no alien with a clear record, was the object of the program (R. 50).

If this notification conveyed any meaning, it was that the Attorney General had a program to deport, as Point II demonstrates, and that Accardi was one of the individuals the Attorney General desired to deport. Contrary to the express language of the notification, the District Court found that the notification merely requested expedition.

Here we do not have a general preliminary revocable opinion formed by an agency in advance of open notice of the charge, followed by an opportunity to rebut it and cross-examine thereon as was involved in *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 700-703 (1948). Here too, unlike *Federal Trade Commission* v. *Cement Institute*, *supra*, and *Fahey* v. *Mallonee*, 332 U.S. 245, 256 (1947), we have a case where the agency head finally resolved the merits of a case before the matter was heard by his subordinates. Accardi never had an opportunity to meet the

charge that he was a racketeer. He was never aware of the charge until the Department of Justice press release of April 3, 1953. No presumption of regularity noted in *Fahey* v. *Mallonee, supra,* applicable in advance that an administrative hearing will be fairly conducted, obtains here.

Mr. McGranery announced that he planned to deport 100 alien racketeers (R. 160). Thereafter he irrevocably decided *ex parte* that Accardi was a racketeer, included him within the program, and "moved to deport him" while the case was pending before the Board (R. 137, 141). This fact was then communicated by others *ex parte* and with great secrecy to the Board of Immigration Appeals (R. 109-110; 189, Finding 5) prior to its decision.

It is obvious from the documentary and other proofs herein, that a person within the program was an individual who was marked for deportation as this Court observed (347 U.S. at 267), as Mr. McGranery and Mr. Sexton admitted, and that the Board was advised of this fact. We must, therefore, reject the District Court's finding that notification to the Board was merely for the purpose of expediting the case.

IV

Ex Parte Notification to the Board that Accardi Was a Racketeer Violated Immigration Regulations and Due Process

This Court observed in the instant case that the immigration regulations have the force and effect of law, 347 U.S. at 265. We submit that when a confidential notice was sent to the Board that Accardi was a racketeer within the Attorney General's program, immigration regulations were violated.

(A) *The Immigration Regulations preclude consideration of matters outside the record.*

In *Alexiou* v. *McGrath*, 101 F. Supp. 421, 424 (Dist. of Col. 1951), the Court ruled as follows:

> "Once the Attorney General has established the procedure affording an opportunity for a fair hearing as has been done here, then I do not believe his discretion can be exercised arbitrarily or capriciously in complete disregard to what appears on the record. These proceedings were infected with unfairness by a consideration of matters outside the record. Any action based on such an unfair hearing is a nullity. If that were not so then we would be injecting into our own system of government the very principles of totalitarianism which we are today struggling to strike down." • • •
>
> "The hearing on eligibility for suspension is tainted, *ab initio*, with unfairness, because evidence not of record was considered. But for that evidence it is wholly speculative whether the requisite finding would have been made. See *Bridges* v. *Wixon, supra.* The charge of lack of due process cannot be avoided by a subsequent attempt at compartmentalization."

Deportation proceedings must be fair and consideration of *evidence* for discretionary relief is an integral part of the deportation hearing.

The administrative proceedings herein were instituted on October 21, 1947 (R. 182) and were therefore controlled by the Immigration Act of 1917 (8 U.S.C. 155-c-2) and the regulations promulgated thereunder (66 Stat. 280).

The regulations under the 1917 Immigration Act provided that the hearing officer should set forth in his opinion "a discussion of the *evidence* relating to the alien's eligibility for such relief (departure in lieu of deportation or

suspension of deportation) and of his reasons for his proposed order." 8 C.F.R. 150.7(b); 1949 ed. Under a 1950 amendment to the regulations, it was specifically provided that the hearing officer should "present *all available evidence* * * * concerning * * * statutory eligibility for discretionary relief" [8 C.F.R. 151.2(c); 1951 Supp.]. "If the alien has applied for relief from deportation, the decision (of the hearing officer) shall also contain a separate determination as to whether or not the hearing officer is satisfied, *on the basis of the evidence presented*, as to the alien's statutory eligibility for the relief requested" 8 C.F.R. 151.5 (a); 1951 Supp.

If the alien is not granted discretionary relief, he is deported. Ever since *Kwock Jan Fat* v. *White*, 253 U.S. 455 (1920), it has been held that only matters of record must be considered, if a deportation hearing is to avoid the charge of unfairness.

Moreover the courts have almost uniformly assumed that only matters of record can sway discretion in deportation hearings.

In *U. S. ex rel Weddeke* v. *Watkins*, 166 F. 2d 369 (C.A. 2, 1948; cert. denied 333 U.S. 876) it was said:

> "Since the regulations of the Attorney General have set up a quasi-judicial procedure for the determination of issues bearing on the propriety of exercising his power to suspend deportation under 8 U.S.C.A., section 155(c), we assume that the alien is entitled to procedural due process in the conduct of such hearing, and we assume further that, if the Immigration Service issues a warrant of deportation without according the alien such procedural due process, the warrant can be challenged on this ground in habeas corpus proceedings."

Arakas v. *Zimmerman*, 200 F. 2d 322, 324 (C.A. 3, 1952) states: "We agree entirely with the holding in *Alexiou* v. *McGrath*, D.C. 1951, 101 F. Supp. 421 * * * ".

In *U.S. ex rel Giacalone* v. *Miller*, 86 F. Supp. 655, 657 (S.D.N.Y. 1949), Judge Rifkind stated:

> " * * * It is now accepted that procedural due process must be observed in a hearing even though the alien is invoking relief which is, in any event afforded only at official discretion. See *United States ex rel. Weddeke* v. *Watkins*, 2 Cir. 1948, 166 F. 2d 369, 371, certiorari denied 1948, 333 U.S. 876, 68 S. Ct. 904, 92 L. Ed. 1152; *Kavadias* v. *Gross*, D.C.N.D. Ind. 1948, 82 F. Supp. 716, 718."

Kavadias v. *Cross*, 82 F. Supp. 716, (N. D. Ind. 1948; reversed upon other grounds, 177 F. 2d 497) followed the rule of *U. S. ex rel Weddeke* v. *Watkins*, *supra*, that discretion must be exercised upon the evidence of record.

See also: *Ex parte Chohan*, 122 F. Supp. 851 (N.D. Calif. 1954).

(B) *Congress did not authorize utilization of matters outside the record.*

In *U. S. ex rel Kaloudis* v. *Shaughnessy*, 180 F. 2d 489, 491 (C.A. 2, 1950) which did not involve matters outside the record, the Court observed that review of discretion was appropriate where its denial was "actuated by consideration that Congress could not have intended to make relevant."

Significantly, where Congress intended that matters outside the record be utilized it specifically authorized it or authorized regulations permitting its use. Such is the case of exclusions without a hearing. 8 U.S.C. 1225(c); *Knauff* v. *Shaughnessy*, 338 U. S. 53 (1950); *Shaughnessy* v. *Mezei*, 345 U.S. 206 (1953). Such is the case of detention of alien

enemies who are not entitled to a hearing. *Ludecke* v. *Watkins*, 335 U. S. 160 (1948). However, where a hearing is authorized—and this is so even in the case of arriving aliens, it must be a fair hearing on record evidence. *Johnson* v. *Tertzag*, 2 F. 2d 40, 42 (C. A. 1, 1924); *U. S. ex rel., Brandt* v. *District Director*, 40 F. Supp. 371 (S. D. N. Y. 1941); Immigration and Naturalization Service *Monthly Review*, February, 1947, p. 101.

(C) *The Board considered matters outside the record.*

The District Court found that the Board was notified that Accardi was within the Attorney General's program (R. 189, Finding 5). The Board was, therefore, notified *ex parte* and outside the record that Accardi was a "top racketeer." It is not only improbable, but highly incredible that such notification from the Attorney General to a subordinate would not affect his exercise of discretion.

As observed by Judge Frank, "Any other finding involves reliance on so remarkable a degree of improbability as to be untenable" (R. 201). After reading newspaper accounts, the Board, unsolicited by direct communication from the Attorney General, consented to receive confidential reports as to program cases, to conform to the Attorney General's announced purposes (R. 106-110). It claimed impartiality in the instant case upon the rejected ground that it was not aware of the Accardi listing (R. 127; 189, Finding 5) and the discredited assertion that the program's aim was solely expedition.

It is only if the Attorney General's program was one solely to expedite and if the notification to the Board could be construed as a simple and pure request to expedite cases that any contrary conclusion could be reached. The documentary evidence and human nature point the other way.

It is for this reason that Chief Judge Clark in the Court below observed (R. 214):

> "The facts shown create a presumption of bias not overcome by the Board's self-serving declaration to the contrary. This would be so whether the program was one of expedition or one of deportation, *for in either case, relator was being singled out as an alien whose imminent deportation was deemed desirable by the Attorney General.*" (Italics supplied).

V

The Evidence Clearly Establishes that Respondent Was Denied Due Process Before the Board

On April 3, 1953, the Board of Immigration Appeals stated as follows with reference to relator (R. 183):

> "Affidavits of persons well acquainted with the alien, *character investigation by the Service*, and the testimony of four witnesses placed in this proceeding *establish that the alien is considered a person of good moral character.* (Emphasis supplied.)

The Board's Chairman admitted that there was no record evidence before him indicating that Accardi was a racketeer (R. 121).

The Department of Justice, however, does not consider the respondent a person of good moral character, but on the contrary have been free in describing him as a "nationally known racketeer" and "hoodlum" (R. 159). (Significantly, petitioner's name will not be found in the Kefauver Report, *Senate Report 307*, 82d Cong. 1st Sess.)

Professor Konvitz, in his recent book, *Civil Rights in Immigration*, (1953) observes: "That there are special drives against these persons (the foreign born) ought to be apparent to anyone who reads the newspapers" (p. 110).

Professor Konvitz properly notes that "in the long run these drives against aliens and foreign born citizens have an evil effect upon the administration of justice" *Civil Rights in Immigration, supra*, p. 125. William Shannon, in his series of articles which began in the New York Post on October 19, 1953 states in the same vein:

> "Almost every day Attorney General Brownell announces the deportation of some alleged subversive or underworld figure. This great 'cleanup drive'—it began before the Republicans took over, but they really went to town with it—seems likely to chalk up a higher box score than that of A. Mitchell Palmer during the 'red scare' days of 1919-20.
>
> "When the clatter of the mimeograph machines in Brownell's busy press office occasionally quiets down, however, it becomes clear that many innocent persons, some of the humble and friendless, have been trapped in Brownell's legal machinery."

Joseph Accardi was and is, in fact, a person of good moral character as found by the Board of Immigration Appeals. He never was a racketeer. He is one of the innocents caught in a deportation drive. The anxiety of the Department of Justice to deport a racketeer made petitioner the object of a grand hoax.[1]

This deportation drive of the Attorney General should be reviewed in the light of the applicable regulations and pertinent provisions of law.

Regulations having the force and effect of law *Accardi*

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[1] On April 27, 1953 the New York Times prematurely reported that Joseph Accardi was the first racketeer deported under the current deportation drive, and on September 23, 1953 Drew Pearson criticized the Department of Justice because it had only deported two criminals out of 133 in eight months.

v. *Shaughnessy*, 347 U. S. at 265 grant an alien a hearing before the Board of Immigration Appeals. 8 C. F. R. 90.3 and 90.5 (1949 Ed.) Violation of such regulations violates due process. *Accardi* v. *Shaughnessy, supra; Bridges* v. *Wixon*, 326 U. S. 135 (1945).

The hearing contemplated by the law and the regulations is a fair hearing upon the record. *Kwock Jan Fat* v. *White*, 253 U.S. 455 (1920); *Bridges* v. *Wixon*, 326 U.S. 135 (1945). In administrative hearings, the liberty of individuals should be "protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing' . . . . Such a hearing has been described as an 'inexorable safeguard.' " *Morgan* v. *United States*, 304 U. S. 1, 14, 15 (1937). And in this connection, it should be observed, that the "fact that a judgment may be justified on the merits does not obviate the requirement of a fair hearing." *National Labor Relations Board* v. *Bryan Mfg. Co.*, 196 F. 2d 477, 478 (C. A. 7, 1952); *Montgomery Ward & Co.* v. *National Labor Relations Board*, 103 F. 2d 147, 149 (C. A. 8, 1939) *Sung* v. *McGrath*, 339 U. S. 33 (1950).

> ". . . for a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judgment is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge. Indeed, if there is any difference, the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed." *National Labor Relations Board* v. *Phelps*, 136 F. 2d, 562, 563 (C.A. 5, 1943). See

also *In re K-3 Pike and Fischer*, Administrative Law (2d) 668 (1952).

In the instant case, the Attorney General disturbed the Board's impartial consideration of the Accardi case:

1. By public announcement of a program to deport which program came to the Board's attention during its deliberations on the Accardi case;

2. By creating a program to deport with named individuals, including Accardi, listed therein prior to the Board's final determination of a case;

3. By communication to the Board that the case was within the program. Admittedly, inclusion within the Attorney General's program, was an indication that a case was not meritorious. On the contrary, "obviously, all aliens within the Attorney General's program have some unfavorable or unsavory factors in their backgrounds which would make it more difficult for them to establish the type of merit which would warrant the granting of discretionary relief." (R. 26). A case marked "Attorney General's list" therefore necessarily conveyed more than just a request for expedition. It was a request to note that the case had a bad background combined with a request to expedite—at minimum, if not a request to deport. And this request was admittedly made *ex parte*. In the instant case, it was a notification that Accardi was a "top racketeer."

If a civil non-jury judge subject to the Attorney General's pleasure for tenure, as are the Board members, were to secretly receive advice as to whether the defendant was a racketeer from the Attorney General in every case before rendering his decision, could it be said that an open and fair trial was granted?

That is precisely the instant situation. The Attorney General determined secretly that Accardi was a racketeer, placed him within his program and secretly moved to deport him (R. 141). The inclusion of Accardi within the program was secretly conveyed to the Board (R. 64, 110). The Board was thereby fully aware, whether the notification be taken at its face value as notice of listing within the program, or contrary to its language as a mere request to expedite, that Accardi's case was not considered meritorious by the Attorney General and that he was a "top racketeer."

Had the Attorney General acted in this fashion—had he issued press releases about a program and included a pending jury case within the program—there can be no doubt that it would be held that there was inference with the functions of the jury. *Delaney* v. *United States*, 199 F. 2d 107 (C.A. 1, 1952). As in the *Delaney* case, an atmosphere was created here, by the Department of Justice itself, which prevented fair, open and impartial consideration. The Supreme Court recently noted: "A juror must feel free to exercise his functions without the F.B.I. or anyone else looking over his shoulder" *Remmer* v. *United States*, 347 U.S. 227, 229 (1954).

See also: *United States* v. *Florio*, 13 F.R.D. 296 (S.D.N.Y., 1952).

The Board, created to act impartially and exercise its independent judgment, should likewise have felt free to exercise its functions without the Attorney General's listing staring over its shoulder. The fact that the Attorney General was the Board's superior, only made his conduct more persuasive upon the Board's decisions. His press releases, his listing of Accardi while the case was pending before the Board, and the advice to the Board that Accardi was on the list—all necessarily had a prejudicial effect upon the Board—even as they would have had upon a jury.

> "In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons deemed presumptively prejudicial if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Remmer* v. *United States, supra.*

Can it be said that the Board would have decided the case in the same manner had Accardi not been on the Attorney General's list? Has the Government conclusively established that fact—when it is noted that in no program case had the Board ever granted an alien permission to remain permanently? (R. 120). It is pure speculation at this late date to ascertain how the Board would have decided the case had it acted without the Attorney General's listing of Accardi and the Attorney General's program as announced in the press. In view of the fact that most Board members had no specific recollection of the Board conference on the Accardi case or whether the case was listed, (R. 69, 70) it is now impossible to determine the exact impact that the program and listing had upon them.

But, in accordance with the *Delaney* and *Remmer* cases, the public releases relative to the program created an atmosphere of prejudice, and the private communication of listing of an "unsavory character" presumptively created prejudice likewise and therefore interfered with the open due process hearing to which relator was entitled. Justification of the administrative judgment on the merits, more-

over, does not obviate the necessity of a fair hearing. *National Labor Relations Board* v. *Bryan Mfg. supra.*

We submit therefore that upon Mr. McGranery's testimoney and the press releases herein—the case was in fact prejudged. But if it was not, such prejudice was thereby created herein, as to render the hearing unfair.

CONCLUSION

The documentary proof herein as well as Mr. McGranery's testimony and this Court's previous decision herein establish that there was a program to deport. Mr. Horan's testimony of the complicated machinery and processing of a case within the Attorney General's program make it seem incredible that all this effort and manpower were utilized merely to place a case within the program to secure expedition. Added to this is the secretive manner in which notifications were sent to the Board that a case was within the program.

The sole source of the Board's knowledge of the program at the time of its decision in the instant case were press releases and newspaper accounts which clearly reflected a program to rid the nation of alleged undesirable aliens. The Board members failed to disclose how they could have formed any contrary impression of the program as reasonable men reading such accounts.

The Board was aware of the program. It was aware that a case within the program either had a black mark against it—or was marked for deportation. At least one member knew the case was within the program. The others merely have no present recollection. But a system was in force to notify them prior to their decision and the press release of April 3, 1953, announced that Accardi was deported pursuant to the program. Prejudgment and prejudice interfering with due process before the Board are conclusively established upon this record.

Purge lists are too reminiscent of the totalitarian tactics

of the abhorred Nazis and Communists. Programs to vigorously enforce our immigration laws are one thing. Programs to deport listed aliens in advance of full consideration of their cases is quite another. There is no place in our way of life for proscribing individuals for deportation and exile before their cases are finally decided upon record evidence.

If the fate of the respondent alone were to be decided by this case, it would be of small moment. Hysteria impels people to destroy the very thing they are struggling to preserve. The hysteria whipped up by the Department of Justice in this case, should not permit us to lose sight of the democratic way that administrative agencies should function. The power of the Attorney General over resident aliens

> "is the power to be administered, not arbitrarily or *secretly*, but fairly and openly under the restraints and principles of free government applicable where the fundamental rights of men are involved, regardless of their origins or race. It is the province of the courts, in proceedings for review * * * to prevent abuse of this extraordinary power, * * * " *Kwock Jan Fat* v. *White*, 253 U.S. 454, 464 (1920).

To prevent abuse of the Attorney General's extraordinary powers over the lives and destinies of our foreign born, judicial intervention is appropriate herein.

A just and proper result has been reached below by appropriate evaluation of the documentary and other proofs. The judgment below should therefore be affirmed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 616

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK DISTRICT, DEPARTMENT OF JUSTICE,

Petitioner,

v.

UNITED STATES OF AMERICA, EX REL. JOSEPH ACCARDI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENT

JACK WASSERMAN,
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Warner Building,
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In its Reply Brief, the Government seeks to contradict the testimony of the Chairman of the Board of Immigration Appeals by offering for the first time evidence to this Court in the form of an Appendix.

The Chairman testified on June 23, 1954, that there "is no case where we have granted suspension of deportation" and in no case had preexamination been granted. (R. 119, 120.) "t was either form of this type of discretionary relief

which was sought in the instant case (R. 181) and it is the failure to exercise discretion with which we are here concerned. 347 U.S. 268.

Case No. I cited in the Appendix of the Reply Brief involved the legal issues of citizenship and expatriation and not discretion. It is the only favorable decision prior to this Court's ruling in the instant case. Case No. II, decided by the Board after this Court's decision, likewise involved a problem of law. Case No. III is the only similar case, and that was decided on March 8, 1955, after this Court's decision, subsequent to the adverse ruling of the Court of Appeals herein on January 7, 1955 and the filing of the petition for a writ of certiorari herein. Case No. III, which involves an alien by the name of Francesco Brancato has not only resulted in the withdrawal of the favorable discretionary relief which has been granted but also in the removal of the hearing officer who conducted the proceedings, as appears more fully from the Appendix annexed hereto. There is therefore no case cited by petitioner in which final favorable discretion has been exercised in a program case.

The testimony of the Chairman, moreover, that at the time he testified, in no case had discretion in the form of suspension of preexamination been granted, was accurate and may not now be impeached.

Respectfully submitted,

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APPENDIX

For Immediate Release
Wednesday, April 6, 1955

THE DEPARTMENT OF JUSTICE

Commissioner Joseph M. Swing of the Immigration and Naturalization Service today issued the following statement:

The Immigration and Naturalization Service has just completed an investigation of the handling of the deportation case of Francesco Brancato. The report of the investigation discloses that, for a period of years, Immigration investigators have been developing information concerning Brancato's activities. The files of the Service contain information obtained from local and federal law enforcement sources, Senate Committee files and from independent investigation by the Service.

The investigation of the case was conducted by the Chief Field Inspector of the Central Office of the Immigration and Naturalization Service, Washington, D. C. It discloses that the Brancato deportation case was assigned to Special Inquiry Officer, Arthur J. Loveland. The hearing before Mr. Loveland commenced March 2, 1953 on a warrant charging Brancato with deportability for conviction of perjury as a crime involving moral turpitude within five years after entry. Brancato was ordered deported March 20, 1953. He appealed to the Board of Immigration Appeals in Washington. On August 11, 1953, the Board dismissed his appeal. Brancato's attorney requested the Board to reopen the case as provided by regulations to permit Brancato to apply for a suspension of the deportation order. On December 28, 1953, the case was ordered reopened by the

Board. Appeals by the Commissioner to the Board to reconsider its decision to reopen were denied. Accordingly, on September 21, 1954, Mr. Loveland conducted a hearing on Brancato's eligibility for suspension but did not develop for the record or place in the record important derogatory information concerning Brancato.

Mr. Loveland did deny, however, the application for suspension on November 15, 1954. The case was referred for review to the Board of Immigration Appeals under the regulations. On March 8, 1955, based solely on its review of the record as developed and forwarded by Mr. Loveland, the Board held that Brancato had established his eligibility for suspension of deportation and that, subject to Congressional approval, he would not be deported.

The report of the Chief Field Inspector upon review indicates that Special Inquiry Officer Loveland was derelict in his duties under the immigration law, and under the regulations, instructions and policy pronouncements of the Service. The report further discloses that Mr. Loveland failed to introduce material and available documentary evidence into the record of Brancato's hearing; failed to develop the record by appropriate interrogation of Brancato based on information contained in the Service files; failed properly to evaluate the evidence offered on Brancato's behalf; and failed to attach relevant documents to the record which was forwarded to the Board of Immigration Appeals. Because of this, the Board was deprived of material necessary for a proper evaluation of Brancato's plea.

The investigation into the circumstances of this case has established that the mishandling of the deportation proceedings resulted entirely from negligence and incompetence; no proof whatsoever has come to light indicating criminality on the part of any employee or officer of the United States Government.

Mr. Loveland has been relieved of his duties. The Service is preparing formal charges for disciplinary action in accordance with Civil Service rules and regulations.

One of my first instructions to the new Regional Headquarters in connection with reorganization of the Service January 3, 1955, was to maintain close and continuous observation of inquiry officers because of the important effect on national welfare they have through deportation and exclusion hearings. Specially selected inspecting officers now are doing this work. One such office surveyed operations in connection with hearings in the Buffalo District, where Mr. Loveland is stationed, before the circumstances in the Brancato case were brought to my attention. The survey report was submitted to me after I began a separate investigation into the Brancato case. The report supports my conclusion that Mr. Loveland lacks the necessary qualifications of a special inquiry officer.

With the case reopened by order of the Board, a further hearing will be held in the immediate future so all available information can be considered.

(1395-3)